

***United States Court of Appeals
for the Second Circuit***



APPENDIX

8/22

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

_____ X
ALICE CRIMMINS,

Petitioner-Appellant,

-against-

HONORABLE HUGH CAREY, as Governor of the
State of New York, and HONORABLE EDYRS
WOODROFFE, Superintendent, Parkside
Correctional Facility,

Respondents-Appellees.
_____ X

77-2051

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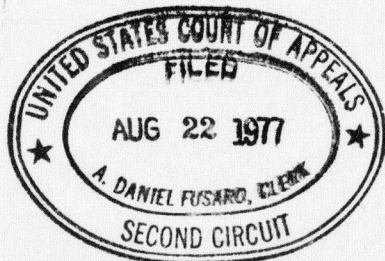
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On Appeal From the United States
District Court for the Eastern
District of New York

APPENDIX

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1ST OFFICE	YR.	NUMBER	MO.	DAY	YEAR	23	5	OTHER	NUMBER	DEM.	YR.	NUMBER
07610	76	1117	106	38	76							
APPEAL						DOOLING, J.						
PLAINTIFFS						DEFENDANTS						

CRIMMINS, ALICE

ALICE CRIMMINS

CAREY, HONORABLE HUGH L., & ANO

HONORABLE HUGH L. CAREY, as GOVERNOR and CHIEF EXECUTIVE OFFICER of THE STATE OF NEW YORK, and HONORABLE EDYRS WOODROFFE, SUPERINTENDENT, PARKSIDE CORRECTIONAL FACILITY

CAUSE

28 USC 2241 - petition for a writ of Habeas Corpus

ATTORNEYS

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77-2051

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FILING FEES PAID

DATE	RECEIPT NUMBER	C.D. NUMBER

STATISTICAL CARDS

CARD	DATE MAILED
JS-5	
JS-6	

(A)

DATE	NR.	PROCEEDINGS
6-18-76		Notice of Petition for a Writ of Habeas Corpus ret. before J. Dool on 7-1-76 at 9:15 AM.
6-21-76		Affidavit of service filed. (2)
7-8-76		Letter dtd. 6-29-76 from R. McMurry to W. Erlbaum filed. (3)
7-12-76		List of petitioner's exhibits filed. (4)
7-22-76		Memo of law in opposition to petition for writ filed. (5)
7-28-76		Before DOOLING, J.- Case called for habeas corpus Motion argued Decision reserved
7-30-76		Letter from R. McMurry with exhibit attached to Judge Dooling filed
12-13-76		By DOOLING, J.-Memo & Order dtd 12-10-76 dismissing the petition filed.
12-13-76		JUDGMENT dtd 12-13-76 dismissing the petition filed. (1)
12-16-76		Notice of motion for certificate of probable cause filed. (9)
12-20-76		Notice of appeal filed. Copy to C of A. (Petitioner) (1)
12-21-76		BY DOOLING, J.- order dtd 12-17-76 granting petitioner's application for a certificate of probable cause for review of the final order entered 12-10-76 filed. (1)
12-21-76		Affidavit of Ralph McMurray in opposition to petitioner's application for a certificate of probable cause filed. (12)
5/10/77		Copy of appointment received from the C of A for appointment of new counsel for plttf. (1)
6-3-77		Above record certified & mailed to C of A. 1d

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 BY [Signature] DEPUTY CLERK

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U.S. DISTRICT COURT E.D. N.Y.

cc
UNITED STATES DISTRICT COURT ★
EASTERN DISTRICT OF NEW YORK

★
DEC 13 1976

-----X
ALICE CRIMMINS,

TIME A.M.
P.M.

Petitioner,

-against-

: 76 C 1137
MEMORANDUM
and
ORDER

HUGH CAREY, Governor of New York; :
EDYRS WOODROFFE, Superintendent, :
Parkside Correctional Facility, :

Respondents. :

-----X

Appearances:

HERBERT A. LYON, Esq. (Messrs. LYON and ERLBAUM
of Counsel) for petitioner.

RALPH L. McMURRY, Esq. (LOUIS J. LEFKOWITZ, Esq.,
Attorney General, and CHARLES HAMMER, Summer
Law Intern, of Counsel) for respondents.

DOOLING, D.J.

Police investigation into the July 1965 deaths of petitioner's two children led to her indictment on September 12, 1967, in the Supreme Court, Queens County, for the murder of her daughter and to her conviction of manslaughter. The conviction was reversed and a new trial ordered because one or more jurors had taken a view of an area involved in the evidence without the knowledge of the court or counsel. (2d Dept. 1969, 33 App. Div. 2d 793, 307 N.Y.S. 2d 81, aff'd 1970, 26 N.Y.2d 319). The first indictment did not include any charge

based on the death of defendant's son. A two count superseding indictment was found on July 10, 1970, charging defendant both with the murder of her son and with manslaughter in connection with her daughter's death. She was convicted as charged on both counts. On appeal the Appellate Division, Second Department, reversed the murder conviction and dismissed the murder count on the law and reversed and ordered a new trial on the manslaughter count, concluding that four significant prejudicial errors had been committed during the trial (1973, 41 App. Div. 2d 933, 343 N.Y.S. 2d 203). The Court of Appeals affirmed the dismissal of the murder count, but it set aside the reversal of the manslaughter conviction and remitted the case to the Appellate Division for its review on the facts and law of the trial court's denial of petitioner's motion for new trial on the ground of newly discovered evidence and on the ground of the prosecutor's failure to disclose information that might have been helpful to the defense (1975, 36 N.Y.2d 230). On the remittal, the Appellate Division affirmed the order denying the motion for a new trial (1975, 48 App.Div. 2d 663, 367 N.Y.S. 2d 532). Petitioner's appeal to the Court of Appeals urged only the failure of the courts below to grant

an evidentiary hearing on the motion. The Court of Appeals affirmed (1975, 38 N.Y. 2d 407).

In this proceeding petitioner alleges that her conviction and detention were obtained through violations of her due process rights in the following respects:

(1) The Assistant District Attorney, after the reversal of the first jury trial conviction, penalized petitioner by adding the charge that she had murdered her son (Cf. Blackledge v. Perry, 1974, 417 U.S. 21; Ciucci v. Illinois, 1958, 356 U.S. 571; Hoag v. New Jersey, 1958, 356 U.S. 464);

(2) Massive and hostile pre-trial publicity deprived petitioner of a fair trial;

(3) The Assistant District Attorney was permitted to bring out that Vincent Colabella, allegedly an accomplice of petitioner, had refused to sign a waiver of immunity when asked to do so;

(4) The Assistant District Attorney, directly or indirectly, commented on petitioner's failure

to testify, expressed his belief in her guilt to the jury, and presented to the jury the idea that petitioner had to prove her innocence; and

(5) The Court and the prosecution failed to disclose to petitioner that during trial a person had come forward with "evidence" pointing toward petitioner's innocence.

1. After the reversal of the conviction at the first trial, petitioner moved to dismiss the indictment, charging first-degree murder, since she could not again be tried for any crime against her daughter except manslaughter. Green v. United States, 1957, 355 U.S. 184. Before that motion had been decided the Grand Jury indicted petitioner for the murder of her son and for manslaughter in the case of her daughter's death. Before trial petitioner moved to sever the two counts for separate trial; the motion was denied.

It is not argued that the acquittal of the murder of the daughter in the first trial adjudicated any essential element of the charge that petitioner murdered her son. The claim is that the addition of the murder count was vindictive, necessarily prejudiced the second trial, and reflected a violation

of petitioner's right to due process. Blackledge v. Perry, 1974, 417 U.S. 21; North Carolina v. Pearce, 1969, 395 U.S. 711, 723-725; cf. Price v. Georgia, 1970, 398 U.S. 323, 331. The suggestion is that the murder charge was added to enhance the penalty that could be imposed on the second trial, as a reprisal for prosecuting the appeal from the first judgment.

The claim is at best a limited one. Petitioner's conviction on the murder count was reversed in the Appellate Division and the count was dismissed. The Court of Appeals affirmed that disposition. The count, moreover, was based on a distinct and separately indictable offense and not, as in Blackledge, Pearce and Price, on the identical misconduct. The prejudice noted in Price is not present here, since two crimes, not one, are here involved, and, moreover, there was no prejudice at trial other than that which inevitably but lawfully arose from trying together two charges which arose out of the same set of facts. See Ciucci v. Illinois, supra; Boag v. New Jersey, supra; cf. United States ex rel. Jackson v. Follette, 2d Cir. 1972, 462 F.2d 1041, 1049-1050.

2. That the trials of petitioner occasioned a great deal of newspaper and radio publicity is practically a matter

of judicial notice. That it was adverse, pervaded the court room, was hostile to a fair trial and was shown to have influenced the verdict is another matter. The trial judge was very evidently able to maintain court room decorum, and the voir dire of the jurors, although not as protracted as some more recent jury selections in the state courts (it covers 690 pages of transcript), was careful and, so far as any juror selection process can, it resulted in the exclusion, without exhaustion of peremptory challenges, of prospective jurors who avowed or admitted bias or indicated that they had formed an opinion on guilt.

It is not altogether clear that the publicity was at the time of trial entirely unwelcome to the defense. After the first trial and the publicity attending it, petitioner and her counsel were forewarned. Nevertheless, no timely motion for a change of venue was made, nor was a sequestration of the jury sought until mid-trial. The interest which the case aroused and the coverage of it by the press particularly resulted in a crowded court house scene, but the record is that the court room itself and the jury were protected from intrusion.

Necessarily, even on direct review, as where a federal appellate court reviews a federal criminal trial, it is recognized that it is the trial judge upon whom the primary responsibility for making a judgment about the effect of publicity on the jurors and on the integrity of the trial must rest, and that his judgment must be accorded a range of discretion proportioned to his superior opportunities to observe and sense the total trial ambience. Cf. United States v. Armone, 2d Cir. 1966, 363 F.2d 385, 396. The extreme case is easily decided. E.g., Irvin v. Dowd, 1961, 366 U.S. 717, 725, where manifest newspaper and police indoctrination of a small community with the message of defendant's guilt and bad character was combined with the court's denial of a timely motion to change venue to a distant county. Even so, as the Court said in Irvin, 366 U.S. at 722

"It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere

existence of any preconceived notion as to the guilt or innocence of an accused; without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."

See also Bishop v. Wainwright, 5th Cir. 1975, 511 F.2d 664, 666 .

3. Eliciting the fact that Colabella had declined to waive immunity when asked to do so - if it occurred - was not an invasion of petitioner's constitutional rights. It can be argued that the inference to be drawn from a refusal to waive immunity is at best thin and too often non-existent. Here counsel objected on the ground that evidence that the witness had declined to sign waivers of immunity was not relevant or permissible or proper and that it was not probative of anything. After hesitating, the trial judge allowed the questions to be asked, and Colabella said he got the waiver forms from the Assistant District Attorney and sent them to his lawyer, but, he also testified he did not know why he was being questioned or that he was expected to go before the Grand Jury inquiring into the Crimmins case. Colabella did not explicitly testify that he refused to sign the waivers.

Nor did the Assistant District Attorney's closing make reference to the waivers.

Colabella was called by the defense as a witness to repel the implication from alleged admissions of petitioner suggesting that he had been an accomplice in the alleged crime. He denied that he had even met petitioner. He denied knowing Anthony Grace, an acquaintance of petitioner's and Grace, in turn, denied knowing Colabella.

Grunewald v. United States, 1957, 353 U.S. 391, 416-421, is clear that where a witness - in that case a defendant - has waived his privilege against self-incrimination by testifying, he may be impeached by showing prior inconsistent statements, and that in some circumstances refusing to testify (or, semble, refusing to waive immunity) can amount to a prior inconsistent statement. The Court held it was error to permit the evidence in Grunewald because the questions asked - and which the defendant declined to answer - would have produced evidence linking the defendant, whether he was guilty or innocent, to a co-defendant; the refusal to answer, therefore, amounted only to saying he would not furnish evidence to support a charge which he had testified was groundless. Cf. United States v. Glasser, 2d Cir. 1971, 443 F.2d 994, 1004-100 .

The Second Circuit Court of Appeals has, in reviewing appeals from federal convictions, somewhat extended the principle of Grunewald so that it seems to inure as a stricture on any direct questioning as to whether a witness had invoked his constitutional right to refuse to testify before a grand jury (United States v. Natale, 2d Cir. 1975, 526 F.2d 1160, 1171), at least where the jury is likely to equate the refusal of the witness to testify with the defendant's guilt. United States v. Sing Kee, 2d Cir. 1957, 250 F.2d 236, 240; cf. United States v. Parness, 2d Cir. 1974, 503 F.2d 430, 437; United States v. Tramunti, 2d Cir. 1975, 513 F.2d 1087, 1115.

The uncertain effect of the essentially unanswered questions in the present case does not approximate the level of effect marked by the questioning in Grunewald, Sing Kee, Glasser and Natale. Each of these cases was, moreover, a case within the supervisory jurisdiction of the federal appellate courts, cf. Cupp v. Naughten, 1973, 414 U.S. 141, 144-146, and the present case is not. The present case, moreover, like Glasser, Natale and Sing Kee is concerned not with Colabella's constitutional right, but with the effect of the questions addressed to him as a witness about his waiver

of immunity on petitioner's constitutionally protected rights.

As in Natale, no damaging consequence is seen to have followed from the ill-advised questions and the uncertain and uninformative answers.

4. Petitioner contends that the Assistant District Attorney's closing argument emphasized petitioner's failure to testify in her own defense and presented the Assistant's belief in petitioner's guilt to the jury.

Petitioner had testified at the first trial - and the jury was aware that the trial was a second trial - but not at the trial here involved. Critically important in the case was petitioner's statement to the police - given at the outset of their investigation - about the events of the evening and night of the crime. The People's opening statement takes up twenty-one pages of transcript; the recital of petitioner's statement to the police takes up eleven pages of the opening and a good deal of the remainder relates to alleged contradictions and untruths in the statement. Very important in the prosecution's case were petitioner's inculpatory statements to one Rorech and her statements to Detective Kelly. The/con-
tention that her right not to testify was invaded arises out of Detective Kelly's testimony and the use to which the

Assistant District Attorney put a part of it in his closing argument.

Kelly was assigned to the case late in July 1965. He first interviewed petitioner on September 1, 1965, with her husband. He told her that investigation disclosed a discrepancy of some hours in one part of the story she had told the police. Her husband, Kelly said, tried to persuade her that she might have mistaken details of her story, but she, Kelly said, insisted that she remembered everything she had done that night. Then, Kelly continued (Tr. 1019):

"She then said to me, 'Look, when you arrest me and take me to court, that's when I'll prove I'm innocent.' Her husband said, 'Alice, how can you prove you're innocent?' Why can't you prove it now?' I then spoke up and I said to the defendant, 'Alice I'm not asking you to prove anything. All I want to hear is the truth and some reasonable explanation why your story doesn't check out.'"

Kelly was then asked about a later conversation with petitioner in May 1967, before the first indictment was filed. He testified that he asked her where she had really gone with the children when (as she had first told the police) she went out with the children after supper to get gasoline; this question, Kelly said, petitioner answered by saying that she

understood that the police were now trying to say that she had the children out in the car at nine o'clock that night. Kelly said that he asked her to repeat (indicating surprise at her attributing her own recital to the police), and that she repeated the same statement. She also said - altering her original recital - that she had fed her children at 6:30. Kelly said that he then indicated that it was futile to continue the conversation. Kelly was not asked on direct examination about a still further conversation in May 1969. On cross-examination petitioner's counsel asked Kelly whether he had met petitioner, gone with her to Idlewild Airport in May 1969 (after the first conviction and before it was reversed), and whether she had asked him why he had not told her that the gas station attendant had said that the children were eating ice cream when they were at the gas station. Kelly said that he answered that petitioner had not asked him that question. Petitioner's counsel then elicited the following (Tr. 1037-

"Q In your last conversation with her did you say anything to her about how she would be able to get off this case without any penalties if she came up with a man who was with her that night?

A I had a suggestion to her as to what I thought might be of aid to her, that's correct.

* * *

Q And did she answer that she couldn't and wouldn't and wasn't looking for any deals?

A No sir."

On the Assistant District Attorney's re-direct examination Kelly testified that in the May 1969 conversation he offered to suggest immunity for petitioner with respect to her son's death if she told the grand jury the whole truth about his death. Kelly said that he told petitioner that she would have to tell the story before she went into the grand jury. He continued (Tr. 1041)

"She said to me, 'You are asking me to stand up and tell the whole world I killed my daughter. I am not going to do that.'"

Kelly said that he told petitioner that he was talking to her about the boy. Kelly testified that petitioner then asked about the first trial and that he told her that if she told the whole truth to the grand jury, a new trial on newly discovered evidence might be possible and, maybe, a plea on the first case. Kelly said that petitioner asked whether he

meant full immunity, that he answered affirmatively, that petitioner said that she would have to talk it over with her lawyer, and that Kelly then told her that her lawyer would probably advise against it. On recross examination it was brought out that petitioner had gone before the grand jury after the May 1969 conversation, that she told Kelly that she did not think Kelly had lied at her first trial but did think Detective Piering and the other witnesses had lied, and that Kelly, although he knew Mr. Lyon represented petitioner, had not advised Mr. Lyon that he had talked to petitioner in May 1969, and that petitioner had not asked Kelly to get any "deal" for her, but that he had said that if petitioner made a full statement about the boy, the district attorney might go along with a new trial for petitioner on the girl's death. Kelly testified further that petitioner waived immunity before she testified before the grand jury.

Petitioner's complaint is not that Kelly was led into the entire strange recital but she complains of the use made of the quoted sentence. In petitioner's closing argument counsel referred to the conversation Kelly had related and proceeded (Tr. 3131) with the reading of the critical sentence:

"She said to me, 'You are asking me to stand up and tell the whole world I killed my daughter.' 'Is that statement the sign of guilt or is that statement the sign of innocence? 'I am not going to do that,' she said. I told her I was talking to her about the boy.' The conversation was that way. Now what about the first trial? What about the girl? But what about the first trial? She is already convicted. What are you going to do for me? No appeals have been started there yet."

Petitioner's counsel continued with stating Kelly's testimony, including Kelly's statement that petitioner had testified before the grand jury, that her testimony was admissible against her and that nothing she said before the grand jury had been offered against her at the trial. Referring to the conversation with Kelly counsel argued (Tr. 3137) -

"It is completely consistent with innocence."

The Assistant District Attorney in his closing argument (Tr. 3260-3262) dealt with the point in the following language, with the following consequence:

"Let me read to you what Mr. Lyon referred to you, but I don't think he got the interpretation out of it that I got. 'I suggested to her that she go into the Grand Jury and tell the truth.' What does the defendant answer: 'You mean by the truth, you want me to stand up and tell the whole world I killed my daughter?' That's what John Kelly meant and that's what she knew John Kelly meant."

THE DEFENDANT: I never meant any such thing, I never --

MR. DEMAKOS: And she said, "I am not going to do that." Well, she doesn't have the courage to stand up here* and tell the world she killed her daughter.

THE DEFENDANT: Because I didn't kill my children.

MR. DEMAKOS: And the shame and pity of it is that this little boy had to die too.

MR. LYON: I will object to his saying she doesn't have the courage to stand up and say she didn't kill her daughter. I don't know what that means. I ask that be stricken.

THE COURT: Overruled. Go on.

MR. DEMAKOS: She doesn't have the courage to stand up and tell the whole world she killed her daughter. and from that point on --

MR. LYON: Your Honor, I don't understand that. I just don't understand it. What kind of trial do you have? Courage to stand up and say she didn't kill her daughter. She pleaded innocent. Why should she stand up? She pleaded innocent.

THE COURT: The People have to prove a case beyond a reasonable doubt.

MR. LYON: And her plea is a plea of innocence.

THE COURT: The plea is a plea of innocence. The record so indicates. Go ahead.

*The word "here" has been assumed to refer to the trial courtroom and not to the time and place of petitioner's talk with Kelly.

MR. DEMAKOS: She wasn't going to do that, and from that night on she set into operation a plan that gave the police department of the City of New York the greatest run around in history sending them off on one wild goose chase after another, including the district attorney's office."

Later in his closing argument the Assistant District Attorney reverted to the idea, saying, "She wasn't going to stand up and tell the world she killed her daughter" (Tr. 3363).

The Appellate Division, in a divided decision, held that the language used in the summation was grossly improper and prejudicial, and tantamount to the prosecutor's asserting that he believed petitioner to be guilty and, in addition was an improper attack on petitioner's refusal to testify. In the Court of Appeals the People conceded that the comment about petitioner's failure to testify was improper and that it constituted constitutional error unless it was rendered harmless beyond a reasonable doubt. A majority of the Court found the error harmless in the circumstances, including, inter alia, the unsworn outbursts of the petitioner before and after the comment, the comments of petitioner's counsel, the courtroom reaction, and the clear instructions of the trial judge, coupled with the overwhelming proof of petitioner's guilt.

The trial court dealt weakly with the event as it occurred, but the argument made by the Assistant District Attorney was at best confused and pointlessly missed the real impact of petitioner's statement. Petitioner thereupon promptly denied killing her children, her counsel pointed out that her plea was a plea of innocent, the trial judge interposed that the People had "to prove a case beyond a reasonable doubt," and the court confirmed that the record indicated that her plea was a plea of innocence.

In the final instructions to the jury the trial judge carefully and fully charged the presumption of innocence (Tr. 3385-3386), and charged on petitioner's right not to testify in this language (Tr. 3403-3404):

"No defendant in a criminal case is compelled to take the witness stand. By the plea of "not guilty," which this defendant interposed to the indictment, the defendant denied the charges against her and put into issue every material allegation of the indictment. Thereupon, the burden was placed upon the prosecution to prove the guilt of the defendant beyond a reasonable doubt.

The fact that this defendant did not take the stand in her own defense may not be considered by you as any admission of her guilt, or as any evidence, directly or raising an inference, that she is guilty, because under the law, as I have explained to you, every defendant is presumed to be innocent. In fact,

the law specifically provides that a defendant may testify as a witness in his own behalf, but the neglect or refusal of a defendant to testify does not create any presumption against her."

It is concluded that the circumstances of the episode deprived it of the prejudicial effect such a statement would have had in a less strange case. Not simply by her outburst, but in a very practical way the petitioner's words - to Piering and his brother officers, to Kelly, to Rorech - were the core of the case. The jury knew that she had been a grand jury witness. The most telling evidence that the People presented was evidence demonstrating the untruths in petitioner's original, detailed recital to the police. Not so much petitioner's defense case as petitioner's testimony, uncross-examined but much impeached, was what petitioner pressed constantly on the triers of the facts, that and the weakness of the motive, the natural improbability of a woman's killing the children whom she was struggling to retain in her own custody, and the defects of character of the supposed lover who testified to petitioner's alleged confession. It is not possible on the record to say that, given the curative effort of the trial judge, the total circumstances of the trial and

the evidence, and the absence of a motion for mistrial at the close of the summation, that the refusal of the Court of Appeals to set the judgment aside reflected an invasion of petitioner's constitutional rights. Cf. Donnelly v. DeChristoforo, 1974, 416 U.S. 637, 642-645; United States ex rel. Cummings v. Zelker, E.D.N.Y. 1971, 309 F.Supp. 4, 8, aff'd, 2d Cir. 1972, 455 F.2d 714; United States v. McCarthy, 2d Cir. 1972, 473 F.2d 300, 304-305.

5. The New York Court of Appeals dealt fully and adequately with the motion based on the Jane Roe affidavit, and on this point the Court was unanimous. The Trial Court in the memorandum decision on the motion explained the manner in which he dealt with the Jane Roe matter. It might have been wiser for the trial court to have conducted a hearing so that the uncertainty about the statements made to Jane Roe could have been cleared up, and to have taken the matter up at once - during trial - with counsel for both sides. However, the Erlbaum and Jane Roe affidavits are not satisfactory and, in final analysis, Jane Roe had no admissible evidence to proffer. At most a remote speculation could be argued from the experience of Jane Roe, and it is not seen that an

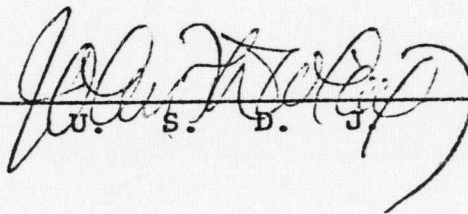
additional speculation could properly have been injected into the case.

It is, accordingly,

ORDERED that the petition for a writ of habeas corpus is dismissed and the writ is denied.

Brooklyn, New York

December 10, 1976.


U. S. D. J.

First Judgment of Conviction -- Court of Appeals

People v. Crimmins, 26 N.Y.2d 319 (1970)

BURKE, J. Defendant was indicted for, and convicted of, killing her daughter. At the trial the People established that the child died of strangulation within two or three hours of her last meal. The body was found at about 2:00 p.m. on July 14, 1965, and an autopsy determined that death occurred approximately 8 to 24 hours prior to discovery. Two of the People's witnesses, Sophie Earomirski and Joseph Rorech, presented substantially all of the evidence which connected defendant to the crime. The former testified that at about 2:00 a.m., on July 14, 1965, she saw defendant carrying a bundle and holding the hand of a little boy; she was accompanied by a man. Defendant's companion took the bundle and threw it into an automobile, and Mrs. Earomirski, from her third floor window across the street, heard defendant say, "My God, don't do that to her." Mr. Rorech testified that at a subsequent time defendant admitted to him, "Joseph, please forgive me, I killed her."

Although defendant raised several alleged errors in the Appellate Division, reversal was predicated on only one—an unauthorized visit by three jurors to the neighborhood which was the subject of Mrs. Earomirski's testimony—and was based on our decision in *People v. De Lucia* (20 N.Y.2d 275). Leave to appeal to this court was granted on the People's application. They argue that reversal is mandated only when prejudice to the defendant is shown and that, as found by the Trial Justice, such prejudice is absent herein. They also argue that the evidence is legally sufficient to establish defendant's guilt beyond a reasonable doubt.

After the trial but before the imposition of sentence, defendant moved, on the basis of a juror's affidavit, to set aside the verdict because members of the jury had made an unauthorized visit to the street on which Sophie Earomirski lived. A hearing was held, and the juror, Samuel Ehrlich, testified that, after Mrs. Earomirski had testified, he wanted to see that area. He went there between 1:00 and 2:00 a.m. Ehrlich further testified that his visit did not influence his opinion.

Another visit was made by Ehrlich and two other jurors, Harry Tunis and Irving Furst, at about 5:30 p.m.

During the jury's deliberations the lighting in the area was discussed in "small talk" and, according to Ehrlich, someone mentioned that the area was well-lit. Another juror, Philip Seidman, testified that the subject was discussed.

During the length of the trial, the jurors were never admonished not to visit any place which had been the subject of testimony. Ironically, after Mrs. Earomirski had testified, defense counsel requested that the court arrange a controlled visit to the area. The court denied the visit as unnecessary.

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In *People v. De Lucia*, this court held: "In this type of case, proof of the fact of the unauthorized visit is sufficient to warrant a new trial without proof of how such visit may have influenced individual jurors in their juryroom deliberations. *Such a visit, in and of itself, constitutes inherent prejudice to the defendants.*" (20 N Y 2d 275, 280 [emphasis supplied].) Appellant's attempt to distinguish *De Lucia* fails to comprehend the nature of the decision in that case. Although the affidavit averred that the jurors had re-enacted the crime, we did not predicate our decision on actual prejudice. That discussion merely demonstrates one of the manifest evils of an unauthorized visit. Since *De Lucia* was in the court on mere allegations, a hearing was ordered, and the afore-quoted statement indicates the quantum of proof which would mandate a new trial. The defendants were not required to establish prejudice.

Moreover, our decision in *People v. Sher* (24 N Y 2d 454) should not be construed as modifying *De Lucia* (*supra*). There, unlawful communications made to jurors were disclosed to the court during the trial and prior to deliberation. After examining the jurors, the trial court was satisfied that the impropriety would not affect their verdict. We held that the pre-deliberation examination was sufficient to "sterilize" the jury. The jury visit herein was not disclosed until after verdict. Without the benefit of a judicial admonition, the jurors, although not *consciously* affected by the visit, would not make the specific effort to disregard it. Thus, no court instruction was made to counteract or "sterilize" any possible *subconscious* effect.

The attempt to distinguish the view made herein from one of the scene of a crime is also without merit. Mrs. Earomirski's ability to see and hear the events to which she testified depended very much on the lighting in the area and the distances involved. And the credibility of her testimony is essential to the prosecution's case. The Legislature perceived the evil in such a view and directed court supervision of views of the place where the crime is alleged to have been committed or where "any material fact occurred" (Code Crim. Pro., § 411). The statutory inclusion is sound, and we ought not to make a tenuous distinction.

Finally, appellant argues that the error is harmless. Assuming that such a determination is not precluded by our holding in *De Lucia*, the question is nevertheless moot. Although, as the People argue, the evidence is legally sufficient to sustain the verdict of guilt, it was not so overwhelming that we can say, as a matter of law, that the error could not have influenced the verdict (*Harrington v. California*, 395 U. S. 250; *Chapman v. California*, 386 U. S. 18). Only two witnesses gave evidence which connected defendant directly with the crime. Rorech, of course, testified that defendant confessed to the slaying, and that testimony, together with that of the coroner, is sufficient to establish a *prima facie* case. (Code Crim. Pro., § 395.) But

that testimony was seriously challenged, and the witness was subjected to searching cross-examination. Mrs. Earomirski was the other witness who implicated defendant, and it is the value of her testimony which may have been affected by the impropriety. Given such limited evidence, we cannot find the error harmless beyond a reasonable doubt.

Accordingly the order of the Appellate Division should be affirmed.

Chief Judge FULD and Judges SCILEPPI, BERGAN, BREITEL, JASEN and GIBSON concur.

Order affirmed.

Second Judgment of Conviction -- Appellate Division

People v. Crimmins, 41 App. Div. 2d 933 (2d

Dept. 1973)

5 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. ALICE CRIMMINS, Appellant.—Appeal by defendant from (1) a judgment of the Supreme Court, Queens County, rendered May 13, 1971, convicting her of murder in the first degree and manslaughter in the first degree, upon a jury verdict, and sentencing her to life imprisonment for the murder and to a prison term of 5 to 20 years for the manslaughter, the sentences to run concurrently; and (2) an order of the same court, dated July 28, 1972, which denied her motion for a new trial on the grounds of newly discovered evidence and improper conduct by the prosecutor in withholding from her information potentially helpful to her defense. Judgment reversed as to the murder count, on the law and the facts, and that count dismissed, on the law; and judgment reversed as to the manslaughter count and new trial granted as to that count, on the law; and appeal from the order dismissed as moot. With respect to the count charging the murder of defendant's son, we believe the corpus delicti was not established, since, as a matter of law, the People did not prove, beyond a reasonable doubt, that his death resulted from a criminal act (*People v. Deacons*, 109 N. Y. 374; *People v. Cuozzo*, 292 N. Y. 85; *People v. Rooks*, 40 Misc 2d 359; see, also, *People v. Cleague*, 22 N. Y. 2d 363, 365-366). Hence, that count of the indictment must be dismissed. As to that count, if we were not dismissing, we would reverse and grant a new trial (1) because the jury verdict was contrary to the weight of the evidence with respect to whether the death resulted from a criminal act and (2) for the reasons hereinafter stated for the reversal and grant of a new trial on the manslaughter count. With respect to the manslaughter count, we believe defendant was deprived of a fair trial and is entitled to a new one because of the following errors and improprieties: (1) It was prejudicial error to permit the prosecutor to adduce testimony from Rorech, an important prosecution witness, that he had been given a sodium pentothal [truth serum] test (cf. *People v. Neumuller*, 29 A D 2d 886). (2) It was prejudicial error to permit the prosecutor to disclose, through his cross-examination of defense witness Colabella, that Colabella had refused to sign a waiver of immunity when questioned by the prosecutor during the pretrial investigation of the case, since, under the circumstances of this trial, Colabella's refusal to sign such waiver may well have been considered by the jury as an indication of defendant's guilt (cf. *People v. Ashby*, 8 N. Y. 2d 238; *United States v. Sing Kee*, 250 F. 2d 236, cert. den., 355 U. S. 954). (3) It was improper for the prosecutor to put before the jury, in his questioning of defense witness Colabella, an alleged damaging admission by him to one Sullivan (whom Colabella denied knowing and which admission he denied making) and then fail to call Sullivan as a witness or explain the failure to call him; this impropriety was aggravated when (a) the prosecutor strenuously opposed a subsequent defense request for a charge that the jury could draw an unfavorable inference from the People's failure to call Sullivan as a witness and (b) the court refused to so charge; and, in the context of this trial, it is immaterial

that defense counsel did not object when these questions were put to Colabella, since defense counsel had every right to then believe that the prosecutor was merely laying a foundation for subsequent impeaching testimony by Sullivan. (4) It was grossly improper and prejudicial for the prosecutor to say, in his summation, that defendant "doesn't have the courage to stand up and tell the whole world she killed her daughter", as that was tantamount to an improper assertion by the prosecutor that he knew defendant was guilty and, in addition, was an improper attack on her refusal to testify. In view of the foregoing disposition of the appeal from the judgment, the appeal from the order denying a new trial is moot and for that reason is dismissed. However, we may note that if we were not reversing the judgment we would reverse the order denying the motion for a new trial and would remand that motion to the trial court for a plenary hearing. Rabin, P. J., and Martuscello, J., concur; Hopkins, J., concurs, except that he dissents from the statement favoring reversal of the order denying the motion for a new trial were the judgment not being reversed. Munder and Christ, JJ., concur in the reversal of the judgment as to the murder count and in the dismissal of that count, and the dismissal of the appeal from the order denying the motion for a new trial, but only insofar as the order relates to the murder count, and otherwise dissent and vote to affirm the judgment as to the manslaughter count and to affirm the order insofar as it relates to that count.

Second Judgment of Conviction -- Court of Appeals

People v. Crimmins, 36 N.Y.2d 230 (1975)

JONES, J. On this appeal we are called on principally to consider the doctrine of harmless error as applied to errors which occurred on defendant's second trial. In this case a mother was charged with criminal responsibility in connection with the deaths of her son and her daughter. On her first trial defendant was charged only with the death of the daughter and was convicted of manslaughter. On appeal this conviction was reversed and a new trial was ordered. (*People v. Crimmins*, 33 A D 2d 793, aff'd. 26 N Y 2d 319.) On her second trial the jury convicted defendant of murder of her son and manslaughter of her daughter. The Appellate Division then reversed the conviction of murder of the son and dismissed the charge against defendant with respect to his death. (*People v. Crimmins*, 41 A D 2d 933.) As to the manslaughter conviction, the Appellate Division also reversed defendant's conviction but ordered a new trial with respect to her responsibility for the death of her daughter. The case is now before us on appeal by the People.

The procedural aspects of this appeal and of our dispositions of its several branches call for exposition. The ultimate issues turn on the procedural significance and consequences properly to be attached to errors of law which occurred during the second trial. We conclude that these errors fall into separate categories calling for different legal results.

I. As to defendant's conviction of murder of her infant son:

The Appellate Division's reversal of this conviction (as distinguished from that court's attendant dismissal of this count in the indictment) was explicitly recited to be "on the law and

the facts". An appeal may be taken to our court only where the reversal is expressly stated to be on the law alone; accordingly an appeal from this reversal may not be taken to our court (CPL 450.90, subd. 2, par. [a]).

By contrast, the corrective action directed by the Appellate Division in consequence of its reversal of the murder conviction, i.e., the dismissal of the murder count, is subject to an appeal to and review by our court (CPL 450.90, subd. 2, par. [b]). We find that corrective action to have been what was required by the Criminal Procedure Law. The reversal of the conviction was based on the conclusion of the Appellate Division that, as a matter of law, the People did not prove that the son's death resulted from a criminal act and, in the alternative, that any finding that it did would be contrary to the weight of the evidence (41 A D 2d 933). CPL 470.20 (subd. 2) mandates dismissal of the accusatory instrument in the event of reversal of a judgment after trial for legal insufficiency of trial evidence; subdivision 5 of the same section mandates the same corrective action where the reversal is on the ground that the

verdict is against the weight of the trial evidence. Accordingly the Appellate Division's dismissal of the murder count with respect to the death of the son must be affirmed.

II. As to defendant's conviction of manslaughter in the homicide of her infant daughter:

The Appellate Division determined that because of errors committed on the second trial this conviction should be reversed. Because such determination was expressly stated to be on the law alone, that aspect of the present appeal, as well as the associated corrective action directed by the Appellate Division, is properly before us (CPL 450.90, subd. 2, pars. [a], [b]). For reasons discussed below, a majority of our court is of the view that this determination of the Appellate Division should itself be reversed. In that circumstance, since the order of the Appellate Division reversing the manslaughter conviction was based on the law alone, the provisions of CPL 470.40 (subd. 2, par. [b]) dictate that the manslaughter conviction be remitted to the Appellate Division for determination of the facts. Presumably consideration will then be revived, too, as to defendant's separate and distinct appeal from the order of Supreme Court

denying her motion for a new trial on the grounds of newly-discovered evidence and of improper conduct by the prosecutor in withholding from defendant information potentially helpful to her defense. In view of the other determinations made at the Appellate Division in the order from which appeal is now being taken it was not then necessary formally to reach or dispose of defendant's contentions with respect to denial of her motion for a new trial. Defendant now becomes entitled to consideration and disposition of such contentions by that court.

We turn then to a discussion of our reasons for concluding that the reversal of the manslaughter conviction should be overturned.

A. As to the constitutional error:

The People concede that the comment of the prosecutor in summation with respect to defendant's failure to testify on her own behalf was improper and constituted constitutional error under the provisions of both the Federal and our State Constitutions (U. S. Const., 5th Amdt.; N. Y. Const., art. I, § 6). All of the members of the court agree that such error calls for reversal and a new trial unless it was harmless under the test for harmless constitutional error laid down by the Supreme Court of the United States, namely, that there is no reasonable possibility that the error might have contributed to defendant's conviction and that it was thus harmless beyond a reasonable doubt (*Chapman v. California*, 386 U. S. 18; *Fahy v. Connecticut*, 375 U. S. 85).

We of the majority are satisfied that this test is met here in view of the circumstances in which the constitutional error occurred—*inter alia*, the unsworn outbursts by defendant herself which both preceded and followed the prosecutor's error, the comments of defense counsel and the reactions in the courtroom at the time, and the explicitly clear instructions of the trial court—coupled with what, as indicated below, we think was the overwhelming proof of defendant's guilt.

Although in our view this case presents no appropriate instance for its application, our discussion of the effect to be given constitutional error should not overlook a parallel, and in some instances an overlapping doctrine, also of constitutional proportion, namely, the right to a fair trial. Not only the individual defendant but the public at large is entitled to assurance that there shall be full observance and enforcement of the cardinal right of a defendant to a fair trial. The appellate courts have an overriding responsibility, never to be eschewed or lightly to be laid aside, to give that assurance. So, if in any instance, an appellate court concludes that there has been such error of a trial court, such misconduct of a prosecutor, such inadequacy of defense counsel, or such other wrong as to have operated to deny any individual defendant his fundamental right to a fair trial, the reviewing court must reverse the conviction and grant a new trial, quite without regard to any evaluation as to whether the errors contributed to the defendant's conviction. The right to a fair trial is self-standing and proof of guilt, however overwhelming, can never be permitted to negate this right. There is no predicate here, however, for any claim that this defendant on her second trial was deprived of any such basic right.

B. As to the nonconstitutional errors:

For the purposes of our disposition of this appeal we assume, although each of the Judges in the majority would not necessarily so decide, that the Appellate Division was correct in concluding that in the circumstances of this trial: (1) it was error to permit introduction of testimony with respect to the witness Rorech's having been given a sodium pentothal (truth serum) test (although nothing was said as to any results thereof); (2) it was error to permit the prosecutor to elicit testimony in cross-examination of defendant's witness Colabella that the latter had refused to sign a waiver of immunity when questioned by the prosecutor during the pretrial investigation of the case; and (3) it was error, after the prosecutor had put before the jury an apparently damaging admission by Colabella to one Sullivan but had thereafter failed to call Sullivan or to explain the failure to do so, for the trial court to deny defendant's request for a charge that the jury could draw an unfavorable inference from the People's failure to call Sullivan as a witness. None of these errors, however, was of constitutional dimension.

We turn then to the question whether any one of such errors, or all taken in combination, calls for a reversal of the jury verdict here.

The definition and elaboration of the doctrine of harmless error as applied to nonconstitutional error involve peculiarly questions of the law of the State of New York to be determined by our State courts. The doctrine has received expression in our court over the last 20 years in various forms, accompanied usually explicitly, always at least implicitly, by a recognition that "[e]rrors are almost inevitable in any trial, improprieties almost unavoidable, [and that] the presence of one or the other furnishes no automatic signal for reversal and retrial" (*People v. Kingston*, 8 N Y 2d 384, 387).

Examination of the language chosen to describe the doctrine and its application in individual cases, as well as analysis of the authorities selected for citation, discloses that we have not always been either consistent in our classification or uniform in our expression. Forms of our verbalization of the doctrine cannot be nicely harmonized. Often there has been no explicit recognition that there is a distinction between constitutional and nonconstitutional error: citations and verbiage have frequently been indiscriminately interchanged. On the other hand, we have never expressly held, as the dissent now urges, that there is no difference in the application of the doctrine of harmless error between constitutional and nonconstitutional error. When we have reached the conclusion that the error was harmless we have stated the rule loosely, in terms relatively easily satisfied. On the other hand when we have concluded that the error was not harmless our statement has been of a tight, demanding rule. The ultimate result in the individual case has been more significant than the particular formulation of the rule. (For cases decided in recent years see *People v. Brosnan*, 32 N Y 2d 254, 262; *People v. Stanard*, 32 N Y 2d 143, 148; *People v. Steiner*, 30 N Y 2d 762, 763-764; *People v. Crimmins*, 26 N Y 2d 319, 324-325; *People v. Baker*, 26 N Y 2d 169, 174; *People v. McKinney*, 24 N Y 2d 180, 185; *People v. Pelow*, 24 N Y 2d 161, 167; *People v. Miles*, 23 N Y 2d 527, 544; *People v. Mirenda*, 23 N Y 2d 439, 446-447; *People v. Cefaro*, 23 N Y 2d 283, 290; *People v. Savino*, 22 N Y 2d 732, 733; *People v. Adams*, 21 N Y 2d 397, 402; *People v. Fein*, 18 N Y 2d 162, 175; *People v.*

Donovan, 13 N Y 2d 148, 153-154; *People v. Duncan*, 13 N Y 2d 37, 42; *People v. Rosenfeld*, 11 N Y 2d 290, 299-300; *People v. Rosario*, 9 N Y 2d 286, 290-291; *People v. Steinhardt*, 9 N Y 2d 267, 271-272; *People v. Kingston*, 8 N Y 2d 384, 387; *People v. Jackson*, 7 N Y 2d 142, 145; *People v. Dziobekski*, 3 N Y 2d 997, 999; *People v. Ochs*, 3 N Y 2d 54, 57; *People v. Savvides*, 1 N Y 2d 554, 557, 558; *People v. Mleczko*, 298 N. Y. 153, 162-163.)

The presently applicable legislative statement of our State's rule, like its predecessor, has not been helpful. "An appellate court must determine an appeal without regard to technical errors or defects which do not affect the substantial rights of the parties" (CPL 470.05, subd. 1). The choice of the adjective "technical" in referring to errors may be said to connote those of a formalistic or minor character. On the other hand, to refer to errors which may affect "substantial" rights suggests errors of a somewhat more serious nature. Notably there has never been incorporated in the statutory language any concept of "harmlessness beyond a reasonable doubt". In any event, our decisions have not turned on or even been significantly affected by the legislative diction of present CPL 470.05 (subd. 1) or of section 542 of the former Code of Criminal Procedure.

It is appropriate therefore to recognize and to delineate the difference between the Federal harmless error rule with respect to constitutional error and our State's harmless error rule with respect to nonconstitutional error.

Two discrete considerations are relevant and have combined in varying proportions to produce specific results in particular cases. The first of such factors is the quantum and nature of proof of the defendant's guilt if the error in question were to be wholly excised. The second is the causal effect which it is judged that the particular error may nonetheless have had on the actual verdict.* It appears that it is the latter consideration which is critical in the application of the Supreme Court test as to harmlessness of constitutional error. Thus, however

* There may be other identifiable considerations in special instances (e.g., *People v. Savvides*, 1 N Y 2d 554, *supra*) in which our court held the conduct of the prosecutor to be so improper as to call for a new trial quite irrespective either of the quantum of evidence of guilt or of any evaluation of the actual effect of the misconduct, at least in part for therapeutic purposes.

overwhelming may be the quantum and nature of other proof, the error is not harmless under the Federal test if "there is a reasonable possibility that the . . . [error] might have contributed to the conviction"—perhaps the most demanding test yet formulated (*Fahy v. Connecticut*, 375 U. S. 85, 86, *supra*; *Chapman v. California*, 386 U. S. 18, *supra*).

Our State rule to determine harmlessness of nonconstitutional error is not the same as the Federal rule.

The ultimate objective, grounded in sound policy considerations, is the wise balancing, in the context of the individual case, of the competing interests of the defendant and those of the People. "While we are ever intent on safeguarding the rights of a defendant . . . we recognize at the same time that the State has its rights too" (*People v. Kingston*, 8 N Y 2d 384, 387, *supra*). Thus, it does not follow that an otherwise guilty defendant is entitled to a reversal whenever error has crept into his trial. On the other hand, we recognize that a finding that an error has not been harmless does not result in fatal consequences to the People: they are put to a new trial, but the defendant does not go free.

Our State test with respect to nonconstitutional error is not so exacting as the Supreme Court test for constitutional error. We observe that in either instance, of course, unless the proof of the defendant's guilt, without reference to the error, is overwhelming, there is no occasion for consideration of any doctrine of harmless error. That is, every error of law (save, perhaps, one of sheerest technicality) is, *ipso facto*, deemed to be prejudicial and to require a reversal, unless that error can be found to have been rendered harmless by the weight and the nature of the other proof. That "overwhelming proof of guilt" cannot be defined with mathematical precision does not, of course, mean that the concept cannot be understood and applied in individual cases, although not always without some difficulty. It surely does not invite merely a numerical comparison of witnesses or of pages of testimony: the nature and the inherent probative worth of the evidence must be appraised. As with the standard, "beyond a reasonable doubt", recourse must ultimately be to a level of conviction. What is meant here, of course, is that the quantum and nature of proof, excising the error, are so logically compelling and

therefore forceful in the particular case as to lead the appellate court to the conclusion that "a jury composed of honest, well-intentioned, and reasonable men and women" on consideration of such evidence would almost certainly have convicted the defendant.

If, however, an appellate court has satisfied itself that there was overwhelming proof of the defendant's guilt, its inquiry does not end there. Under our system of justice a jury is not commanded to return a verdict of guilty even in the face of apparently conclusive proof of the defendant's guilt. Similarly it may and often does exercise a positive sense of moderating mercy. Further inquiry must accordingly be made by the appellate court as to whether, notwithstanding the overwhelming proof of the defendant's guilt, the error infected or tainted the verdict. An evaluation must therefore be made as to the potential of the particular error for prejudice to the defendant. We hold that an error is prejudicial in this context if the appellate court concludes that there is a significant probability, rather than only a rational possibility, in the particular case that the jury would have acquitted the defendant had it not been for the error or errors which occurred.

Turning then to the record now before us, we of the majority conclude that, excising both the evidence erroneously admitted (with respect to Rorech's taking a truth test and as to Colabella's refusal to sign a waiver of immunity) and the prosecutor's interrogation of Colabella (as to the latter's damaging admission to Sullivan), there was overwhelming proof that this defendant was guilty of manslaughter in the death of her daughter. In addition to other compelling circumstantial evidence, there was eyewitness testimony (unavailable to support the conviction on the first trial because it had been infected by the wholly improper visit of jurors to the scene) that on the night before the daughter's body was found, defendant, carrying what was described as a "bundle" and accompanied by an unidentified man, was seen leading her son from the Crimmins home; that as the man threw the "bundle" into a parked car defendant cried out, "Please don't do this to her", to which the man responded, "Does she know the difference now? . . . Now you're sorry." Additionally defendant herself later confessed her guilt to her paramour—"Joseph,

forgive me, I killed her." On the other hand the description which defendant offered of the events of the evening preceding the children's disappearance was completely discredited and the prosecution conclusively exploded defendant's theory of an outside kidnapper. We read this record as leading only to a single, inexorable conclusion, as two juries have indeed found: defendant was criminally responsible for the death of her daughter.

Proceeding further, then, as we must, we also conclude that in the circumstances of this case there is no significant probability in the light of the overwhelming proof that, had it not been for the errors which occurred, this jury would have acquitted the defendant or that a third jury might do so. Our ultimate conclusion, therefore, is that under our State rule the nonconstitutional errors which occurred on this defendant's second trial were harmless.

The order of the Appellate Division with respect to the manslaughter conviction should accordingly be reversed, and the case remitted to the Appellate Division for determination of the facts in conformity with CPL 470.40 (subd. 2, par. [b]).

COOKE, J. (concurring in part and dissenting in part).

I

I agree with the court's disposition of the appeal from that portion of the order of the Appellate Division which reversed defendant's conviction of the murder of her infant son and dismissed that count of the indictment.

II

With respect to the manslaughter count, I would affirm the order of the Appellate Division. There is reason for grave concern because of the rule formulated by the majority for the review of "nonconstitutional" errors and its application to this case.

As to errors of constitutional dimension, the majority recognizes the standard of *Chapman v. California* (386 U. S. 18, 24), that before a constitutional error can be held harmless the court must be able to declare a belief that it was harmless beyond a reasonable doubt. This standard is followed by the declaration of "a parallel, and in some instances an over-

lapping doctrine, also of constitutional proportions, namely, the right to a fair trial," such that "if in any instance, an appellate court concludes that there has been such error of a trial court, such misconduct of a prosecutor, such inadequacy of defense counsel, or such other wrong as to have operated to deny any individual defendant his fundamental right to a fair trial, the reviewing court must reverse the conviction and grant a new trial, *quite without regard to any evaluation as to whether the errors contributed to the defendant's conviction*" (emphasis supplied) (p. 238). As to "nonconstitutional errors", the majority establishes (p. 242) the further precept that, if "an appellate court has satisfied itself that there was overwhelming proof of defendant's guilt," further inquiry must be made by it "as to whether . . . the error infected or tainted the verdict" and "an error is prejudicial in this context if the appellate court concludes that there is a significant probability, rather than only a rational possibility, in the particular case that the jury would have acquitted the defendant had it not been for the error or errors which occurred."

While the effort to harmonize the Constitutions, the statute and judicial pronouncements and to render a yardstick to guide courts in the conduct of criminal trials and in reviewing alleged errors therein is creditable, it is urged respectfully that the majority's opinion does not accomplish that result. To begin with, what has evolved is indeed a trifurcated standard for appellate scrutiny. There is a fork of error "harmless beyond a reasonable doubt" as to "constitutional" deprivations, another "also of constitutional proportion, namely, the right to a fair trial . . . quite without regard to any evaluation as to whether the errors contributed to the defendant's conviction" (pp. 237-238) and a third with a test of "significant probability" applicable to nonconstitutional errors. This three-pronged measure will be difficult to administer and apply and, instead of clarity, confusion comes forth.

Although the decision of the Supreme Court in *Chapman* did not purport to establish a harmless error rule for application to all errors, there are strong reasons for applying the "harmless beyond a reasonable doubt" standard to all errors affecting the substantial rights of a party which arise under the State Constitution or State law, as well as to those which

emanate from the Federal Constitution. Such a rule would not be inconsistent with the mandate of CPL §70.05 (subd. 1), which merely directs an appellate court to determine an appeal without regard to technical errors which do not affect the substantial rights of the parties.

First, if the nature of the error is constitutional, it is going to be difficult, if not impossible, to determine which test shall be applied. Should it be according to the *Chapman* scale where "the court must be able to declare a belief that it [the constitutional error] was harmless beyond a reasonable doubt"? Or, should there be a weighing to ascertain if there has been a "full observance and enforcement of the cardinal right of a defendant to a fair trial . . . quite without regard to any evaluation as to whether the errors contributed to the defendant's conviction"? (p. 238). Although it is obvious that the criteria are not the same, the majority does not supply the answer.

Second, to establish a coexisting rule that where there has been denied to "any individual defendant his fundamental right to a fair trial, the reviewing court must reverse the conviction and grant a new trial, quite without regard to any evaluation as to whether the errors contributed to the defendant's conviction" (p. 238) is incongruous, since generally one of the most significant inquiries to be made in ascertaining whether a fair trial has been accorded a defendant concerns the effect of any error, misconduct, inadequacy or wrong upon the verdict. Such a rule would unnecessarily place in jeopardy a host of convictions.

Third, it is apparent from a reading of *Chapman v. California* (386 U. S. 18, 24, *supra*) that the test of "harmless beyond a reasonable doubt" was adopted as a corollary to the reasonable doubt standard applicable to criminal cases. By adopting a test regarding so-called "nonconstitutional" errors which requires "a significant probability . . . that the jury would have acquitted defendant had it not been for the error or errors which occurred" (p. 242), the court is dangerously diluting the time-honored standard of proof beyond a reasonable doubt which has been a cornerstone of Anglo-Saxon criminal jurisprudence. No one would dispute the statement that a defendant in a criminal case has a constitutional right

to be proven guilty beyond a reasonable doubt before he is deprived of his life, liberty or property (U.S. Const., 5th Amdt., 14th Amdt., § 1; N. Y. Const., art. I; *In re Winship*, 397 U. S. 358, 363-364; La Fave & Scott, *Criminal Law*, Hornbook Series, pp. 45-46; cf. *Matter of Richard S.*, 27 N Y 2d 802; see CPL 70.20). Unless an appellate court can say that errors committed at trial, which affected defendant's substantial rights, are harmless beyond a reasonable doubt, defendant's right to that standard of proof can be severely prejudiced, the extent of the prejudice depending upon the nature of the error in the context of other proof and the circumstances of the case.

Fourth, while the conceptual distinction between constitutional and nonconstitutional errors is a real one, the differentiation is of dubious validity as applied to the appellate review process. As the history of the "right-privilege" distinction in law indicates, the process of ascribing labels to concepts from which serious consequences flow is one fraught with peril and one uniquely susceptible to semantic gamesmanship. (For a history of the right-privilege distinction see Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439.) Ultimately, the Supreme Court opted for a course of action where the consequences to the particular party, rather than the label attached, determined the scope of due process safeguards (see *Goldberg v. Kelly*, 397 U. S. 254, 262-263).

The pitfalls of utilizing the "constitutional" and "nonconstitutional" dichotomy to determine the standard of review are apparent. According to the rule enunciated by the majority, the "harmless beyond a reasonable doubt" test is applied where a constitutional error, other than one which denied the right to a fair trial, is involved; however, in a nonconstitutional error situation, the test of "significant probability . . . that the jury would have acquitted" (p. 242) but for the error comes into play. Given a case, like this one, where there is an accumulation of errors, or even in other situations involving a single error, the effect of which is such as to deprive a defendant of his or her constitutional right to a fair trial (*Irvin v. Dowd*, 366 U. S. 717, 722; *In re Murchison*, 349 U. S. 133, 136), even the most intense student of the law must wonder which standard is to be applied. Of course, if a single standard of harmless

error beyond a reasonable doubt is in force, such difficulties would not arise.

More fundamentally, a defendant's constitutional right to a fair trial can be prejudiced equally by nonconstitutional errors as by constitutional errors. This is why it makes little sense to have a strict standard of review in one area and a looser one in the other. In the instant matter, for example, the constitutional error, which triggers the more exacting standard of review, was not of great significance in the context of the trial and was provoked to some extent by defendant's action, as the majority recognizes. Far more serious, in my opinion, were the errors the majority labels as nonconstitutional. On this record, these and other errors cannot be shown to be harmless beyond a reasonable doubt. In any event, their effect was to deprive defendant of a fair trial and the conviction must be reversed (see *People v. Trybus*, 219 N. Y. 18, 21).

One of the major items of evidence received at the trial was an admission made by defendant to Joseph Rorech in which she admitted killing her daughter. The majority does not deny that it was error to permit introduction of testimony that Rorech, an important prosecution witness, had been given a sodium pentothal (truth serum) test. It is difficult to imagine evidence that could have had as grave an impact upon the jury in their assessment of the credibility of the witness Rorech, to defendant's obvious detriment. Under any view of the case, the error affected defendant's "substantial rights" (CPL 470.05, subd. 1) to have the jury evaluate the believability of the witness without the distraction of totally irrelevant considerations injected by evidence erroneously received.

The prosecution's theory was that Colabella was with defendant on the night her daughter was killed and helped her dispose of the body. The admission into evidence of proof regarding his failure to sign a waiver of immunity, when questioned by the prosecutor during the pretrial investigation of the case, was "most improper" and also affected defendant's "substantial rights" since, as observed by the majority in the Appellate Division, his refusal may well have been considered by the jury as an indication of defendant's guilt (cf. *People v. Ashby*, 8 N Y 2d 238, 242-243; *United States v. Sing Kee*, 250 F. 2d 236, 240, cert. den. 355 U. S. 954). The existence of this

issue, involving indirectly at least the Fifth Amendment, has "constitutional overtones" (see *Namet v. United States*, 373 U. S. 179, 186-187; *Grunewald v. United States*, 353 U. S. 391, 423-424) and points up again the difficulty in assigning the labels employed by the majority.

Likewise, the seriousness of the error, in putting before the jury Colabella's alleged admission to Sullivan that he had a girl friend, Alice, "who was in a jam," and asking Sullivan to help get rid of a body, is readily apparent. Colabella denied not only knowing Sullivan but making the admission, and Sullivan was not called as a witness nor was an explanation given for the failure to call him. As pointed out in the decision under review, this impropriety was aggravated when "(a) the prosecutor strenuously opposed a subsequent defense request for a charge that the jury could draw an unfavorable inference from the People's failure to call Sullivan as a witness and (b) the court refused to so charge" (41 A D 2d 933).

The trial was infected with further prejudicial error in placing before the jury the subject of defendant's trip to the Bahamas with a married man. The only conceivable relevancy of this item was on the question of motive but testimony bearing on this subject would be incompetent since there was not a logical relation between it and the commission of the crime charged "according to known rules and principles of human conduct" (*People v. Fitzgerald*, 156 N. Y. 253, 258; *Richardson*, Evidence [Prince — 10th ed.], § 171). As noted recently in *People v. Sandoval* (34 N Y 2d 371, 376), "it must be recognized as inevitable . . . that evidence of prior criminal, vicious or immoral conduct will always be detrimental to the defendant."

Further difficulty is encountered regarding the introduction of evidence that, on the date of her alleged confession, defendant became extremely distraught upon reading a newspaper account of the arrests of 13 persons at the "Little Appalachian" meeting in Queens and kept repeating a name. It turned out later that Colabella was not named in the news story nor was it his name which defendant repeated. This Mafia "angle", introduced without relevance, was prejudicial and may have played an important part in the trial. One major witness, Sophie Earomirski, who allegedly saw defendant from a distance on the night of the crime carrying a bundle and overheard

an incriminating conversation, justified her failure to come forward promptly with her evidence on the grounds of fear. With the prosecutor's injection of a spurious organized crime aspect to the case, in itself dangerous, her explanation very likely gained a credence it might otherwise have lacked.

The majority (p. 242) resolves the problem by "excising both the evidence erroneously admitted (with respect to Rorech's taking a truth test and as to Colabella's refusal to sign a waiver of immunity) and the prosecutor's interrogation of Colabella (as to the latter's damaging admission to Sullivan)" and by finding overwhelming evidence of guilt. Performing such radical surgery on the evidence fails to recognize sufficiently the danger of improperly influencing or "tainting" the verdict by "harmless errors". Jurors, hearing the events unfolding in an emotion-charged atmosphere may very well impute greater importance to evidence erroneously received than is apparent by speculation of appellate courts, removed from the environment and reading cold print. Their assessment of such evidence may color their entire outlook of defendant's legal position.

More importantly, however, it is not for this court to usurp the function of the jury and speculate whether, without this evidence erroneously admitted, the jury nevertheless would have acquitted (see dissent in *People v. Catalanotte*, 36 N Y 2d 192). What this court wrote in *People v. Marendi* (213 N. Y. 600, 619) many years ago is just as true today: "where prejudicial matter is erroneously received in evidence on a disputed question of fact, its harmful character cannot be determined solely by the mere weight of competent evidence unless we are to resolve ourselves into a jury and, ignoring the finding upon incompetent evidence, substitute one upon the evidence which we may deem competent." That two juries have found guilt is beside the point, just as is the fact that the both verdicts, up to this point, have been set aside by different courts. This court, following the first trial said (26 N Y 2d 319, 324): "Although, as the People argue, the evidence is legally sufficient to sustain the verdict of guilt, it was not so overwhelming that we can say, as a matter of law, that the error [then under review] could not have influenced the verdict (*Harrington v. California*, 395 U. S. 250; *Chapman v. California*, 386 U. S. 18)." Emotions aside.

the failure to accord an accused a fair hearing violates even the minimal standards of due process regardless of the heinousness of the crime charged (see *Irvin v. Dowd*, 366 U. S. 717, 722, *supra*).

The fact is that different items of prejudicial matter were admitted and were before the jury for its consideration. The character of the evidence was such that they may well have affected the jury's evaluation of other items of evidence, to defendant's detriment. Where these several major elements of evidence against defendant were tainted by error, it cannot be said that the case against defendant, although persuasive, was overwhelming and that a jury composed of honest, well-intentioned, and reasonable men and women could not have acquitted her.

I would affirm the order of the Appellate Division.

Chief Judge BREITEL and Judges JASEN, GABRIELLI and WACHTLER concur with Judge JONES; Judge COOKE concurs in part and dissents in part and votes to affirm in a separate opinion in which Judge FUCHSBERG concurs.

Order modified and case remitted to Appellate Division, Second Department, for further proceedings in accordance with the opinion herein and, as so modified, affirmed.

Motion for a New Trial -- Court of Appeals

People v. Crimmins, 38 N.Y.2d 407 (1975)

Chief Judge BREITEL Defendant has twice been convicted, after jury trials, of manslaughter in the first degree for killing her daughter. She was sentenced from 5 to 20 years' imprisonment.

On this appeal, defendant contends that she was wrongfully

denied a hearing by the Supreme Court on her motion to vacate judgment. The Appellate Division affirmed.

The critical issue is whether the denial, without a hearing, of defendant's motion to vacate judgment upon the ground of newly discovered evidence may be reviewed by this court. The dissenter's challenge that there has been a denial of justice makes imperative consideration and elaboration of the issue and the questions of law and fact which resolve them conclusively.

There should be an affirmance. The power to review a discretionary order denying a motion to vacate judgment upon the ground of newly discovered evidence ceases at the Appellate Division. This court, limited in a noncapital criminal action to reviewing questions of law only, has no power to review the discretionary denial of a motion to vacate judgment upon the ground of newly discovered evidence. Not to be confused is this court's power to set aside a conviction on the ground that it is not supported by proof sufficient to establish guilt beyond a reasonable doubt as a matter of law (see *People v. Santos*, 38 NY2d 173, and cases cited).

Even if the denial of such a motion were reviewable, the same result would obtain. The "newly discovered evidence" consisted only of an affidavit of a "witness" submitted some seven years after the events described in it had occurred. The affidavit was complete on its face, that is, it presented fully, and in the best possible light, all the evidence the "witness" could possibly offer on defendant's behalf. Assuming affiant's sincerity, his averments were in part conclusory and were highly unreliable as to accuracy of recollection. The averments did not disclose a probability, as opposed to a mere possibility, that the jury would have rejected the overwhelming evidence of defendant's guilt and returned a verdict more favorable to defendant. Thus, the court below properly denied the motion without a hearing.

In 1968, defendant was convicted, after jury trial, of manslaughter in the first degree for killing her daughter. That conviction was reversed on appeal and a new trial ordered (33 AD2d 793, *affd* 26 NY2d 319).

Thereafter, in 1971, defendant was convicted, after jury trial, of murder in the first degree for killing her son, five years of age, and, for the second time, of manslaughter in the first degree for killing her daughter, four years of age. The Appellate Division reversed the murder conviction, on the law

and the facts, and dismissed the applicable murder count in the indictment. That court also reversed the manslaughter conviction, on the law only, and ordered a new trial (41 AD2d 933). This court affirmed with respect to the dismissal of the murder charge, but reversed the order granting a new trial and remitted the appeal to the Appellate Division for a determination of the facts (36 NY2d 230, COOKE and FUCHSBERG, JJ., dissenting in an opn by COOKE, J.).

The Appellate Division, on remittal, affirmed the judgment of conviction. It also affirmed an order denying defendant's double-branched motion to vacate judgment upon (1) the ground of newly discovered evidence and (2) asserted improper conduct by the prosecution in withholding from her information allegedly helpful to her defense (48 AD2d 663). Leave to appeal to this court was granted by a Justice of the Appellate Division. On the present appeal, defendant has limited her argument to whether she was entitled to a hearing in connection with her motion to vacate judgment.

The evidence upon the second trial compels the conclusion that defendant killed her daughter. At the second trial, Joseph Rorech, one of defendant's paramours, testified that she had confessed to him that she had killed her daughter. Rorech also recounted other conversations with defendant during which she indicated her guilt.

On July 14, 1965, defendant's daughter's body had been found in a vacant lot near defendant's residence. An autopsy revealed that the little girl had been asphyxiated by human agency. From a scientific analysis of the contents of her stomach, it was established that the girl had died from less than one half hour to no more than two hours after eating. Defendant admitted to police officers investigating the disappearance of her children that, on the evening of July 13, she had fed them a meal which began at 7:30 P.M. and ended at 8:15 P.M. Thus, it would appear that the daughter was killed between approximately 8:30 and 9:00 or 9:30 P.M. Defendant's own statements establish that she, separated from her husband, had exclusive custody of the children during those hours.

As Judge JONES recounted, on behalf of a majority of the court, in *People v Crimmins* (36 NY2d 230, 242, *supra*), "In addition to other compelling circumstantial evidence, there was eyewitness testimony * * * that on the night before the

daughter's body was found, defendant, carrying what was described as a 'bundle' and accompanied by an unidentified man, was seen leading her son from the Crimmins home; that as the man threw the 'bundle' into a parked car defendant cried out, 'Please don't do this to her', to which the man responded, 'Does she know the difference now? * * * Now you're sorry.' This eyewitness was Mrs. Sophie Earomirski, one of defendant's neighbors.'

Moreover, still other evidence pointed to defendant's guilt. For example, defendant's trial theory was that her children had been abducted from the house by outside kidnappers. Since the children presumably were asleep in their locked bedroom at the time of the "abduction", if the defense theory were valid, the kidnappers must have entered the Crimmins residence and removed the children through the bedroom window. Yet, police investigation the following day established that layers of dust on a chest of drawers in the bedroom abutting the window and on the window sill were undisturbed. As the court stated, "the prosecution conclusively exploded defendant's theory of an outside kidnapper" (36 NY2d, at p 243).

Thus, the majority concluded (36 NY2d, at pp 242, 243, *supra*): "there was overwhelming proof that this defendant was guilty of manslaughter in the death of her daughter * * * We read this record as leading only to a single, inexorable conclusion, as two juries have indeed found: defendant was criminally responsible for the death of her daughter."²

Indeed, the proof of defendant's guilt was so overwhelming that the case has withstood an attack based upon trial errors committed by the prosecution. Those errors were held to be harmless: in the case of constitutional error, beyond a reasonable doubt; and in the case of nonconstitutional error, because "there is no significant probability in the light of the overwhelming proof that, had it not been for the errors which occurred, this jury would have acquitted the defendant or that a third jury might do so" (36 NY2d, at p 243). Of course, the dissenters on that appeal did not and still do not agree with

1. Notably, Judge JONES in referring to "compelling" evidence, addressed himself to the circumstantial evidence in the case rather than to the testimonial evidence of Mrs. Earomirski, a witness whose credibility was severely attacked by the defense.

2. It was not on this appeal but on the first appeal, after the first trial, to this court, that Mrs. Earomirski's testimony was described, in the opinion from which the dissenter quotes, as "essential" to the prosecution (26 NY2d, at pp 322, 324).

that evaluation (see dissenting opn by COOKE, J., at pp 243-250).

This statement of the harmless error rule with respect to nonconstitutional errors did not constitute a new rule. As the court stated, the "doctrine [of harmless error] has received expression in our court over the last 20 years" (36 NY2d, at p 239). The rule restated on the second *Crimmins* appeal was an accommodation to what had developed in the area of harmless error over the years, from the time of the Code of Criminal Procedure to the CPL, and has survived the latter day imposition by the Supreme Court of a harmless "beyond a reasonable doubt" rule for Federally-declared constitutional error. Nonconstitutional error, as has been the statutory rule since 1881 and the decisional law in this State for over one hundred years, is harmless when, given the overwhelming proof of a defendant's guilt, there is no significant probability that the jury would have acquitted the defendant if the error had not been committed (see, e.g., Code Crim Pro. § 542 [L 1881, ch 504, § 542]; CPL 470.05, subd 1; *Shorter v People*, 2 NY [Comstock] 193, 202; *People v Corey*, 148 NY 476, 493-494; *People v Marelli*, 213 NY 600, 619; *People v Crimmins*, 36 NY2d 230, 239-240, and cases cited at p 242; see, also, *Stokes v People*, 53 NY 164, 180).

It has been useful in the context of this case to examine the harmless error rule applicable to nonconstitutional error, for it is similar to the statutory standard for determining when a motion to vacate judgment upon the ground of newly discovered evidence should be granted (see CPL 440.10, subd 1, par [g]).

The "newly discovered evidence" upon which defendant's motion to vacate judgment is in part based is an affidavit by one who came forward with his story some seven years after the events he narrates. The would-be witness averred that, in the early morning of July 14, 1965, shortly after 1 A.M., he had picked up two small children, a boy and a girl, "hitchhiking" in the vicinity of 150th Street and "probably" 75th Avenue in Queens County. He learned from the boy "that he [the boy] knew exactly where 'home' and his 'daddy' was." He drove, under the boy's direction, for several blocks, and eventually let the children out at the southwest corner of 162nd Street and 71st Avenue. Supposedly a responsible individual, affiant was "quite sure" these small children "were safe and sound" at this spot where he left them in the wee hours of the

morning. If they had been the Crimmins children they would have been four and five years of age, respectively.

Affiant did not learn the names of the children. Despite this, he stated unequivocally in the affidavit that these two children were the Crimmins', a conclusion admittedly reached only after reading about the killing in the newspapers a few days later. He did state in the affidavit that the boy "could very well have" identified his companion as "Missy" (defendant's daughter's nickname) instead of "my sister", as he had first thought. He does admit, however, that he arrived at this conclusion only after reading newspaper accounts of the first trial, three years after the incident. The affidavit concludes with an uncertain hypothesis of how the Crimmins children met their fate.

The trial court, as noted, denied, without a hearing, defendant's motion to vacate judgment upon the ground of newly discovered evidence based on the affidavit.

CPL 440.10 (subd 1, par [g]) provides that:

"At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that: * * *

"New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such a character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence".

CPL 440.10 (subd 1, par [g]) is the successor to subdivision 7 of section 465 of the former Code of Criminal Procedure, which provided for application for a new trial on similar, but somewhat more stringent, grounds (see 6 Zett, New York Criminal Practice, par 50.3, subd [1], par [g]). Unlike a post-conviction application for a new trial under the code, which had to be made within one year after judgment, no time limitation is prescribed for a motion to vacate judgment under CPL 440.10 (subd 1, par [g]) (compare former Code Crim Pro, § 466).

CPL 440.10, captioned "Motion to vacate judgment", was intended to encompass contentions which formerly could have

been raised on an application for postconviction relief in the nature of *coram nobis*, a postconviction application for a new trial upon the ground of newly discovered evidence, and those which may be raised in State and Federal habeas corpus proceedings, as well as other contentions (see Denzer, Practice Commentary, McKinney's Cons Laws of NY, Book 11A, CPL 440.10, at p 183; Pitler, New York Criminal Practice Under the CPL, pp 830-831).

Historically, neither an order denying *coram nobis* relief nor an order denying a postconviction application for a new trial upon the ground of newly discovered evidence was appealable (see *People v Gersewitz*, 294 NY 163, 166, app dsmd 326 US 687; *People v Trezza*, 128 NY 529, 533). This was so because the right to appeal in a noncapital criminal case is purely statutory, and no statute authorized such appeals (*id.*; compare a prejudgment motion for a new trial upon the ground of newly discovered evidence, which, as a part of the judgment roll, could be appealed under section 517 of the former Code of Criminal Procedure [see *People v Priori*, 163 NY 99, 107-108; Cardozo, Jurisdiction of the Court of Appeals (2d ed), § 122]).

In 1947, however, section 517 of the former Code of Criminal Procedure was amended to authorize an appeal from an order denying a "motion to vacate a judgment" (L 1947, ch 706; see *Matter of Bojinoff v People*, 299 NY 145, 149). The amendment was initially interpreted to apply to a denial of a postconviction application for a new trial upon the ground of newly discovered evidence (see *People v Greenfield*, 275 App Div 862, 863). In 1953, however, section 517 was again amended to make clear that an appeal was authorized only from an order denying an "application for a writ of error *coram nobis*" (L 1953, ch 602; see *People v Palumbo*, 282 App Div 1059). Thus, before the enactment of the CPL, a denial of a postjudgment application for a new trial upon the ground of newly discovered evidence remained nonappealable (see, e.g., *People v Baxter*, 40 AD2d 551; *People v La Rocca*, 37 AD2d 974; *People v Hendry*, 13 AD2d 793; Pitler, *op. cit.*, at p 834).

With the passage of CPL 450.15 (subd 1) and CPL 450.90 (subd 1), an order denying a motion under CPL 440.10 (subd 1, par [g]) to vacate judgment upon the ground of newly discovered evidence was made appealable (see Pitler, *op. cit.*, at p 834). While this would appear to resolve the issue of appealability, it does not settle the question of reviewability by this

court. The Legislature is free to expand or contract by statute the classes of noncapital criminal cases which may be appealed to the Court of Appeals. The court's power to review may not, however, be expanded by statute alone, and the CPL must be read in context of constitutional limitations, whether the CPL is explicit or not (compare NY Const, art VI, § 3, subd b with subd a).

Section 3 of article VI of the Constitution provides that "The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death". Thus, CPL 470.35 (subd 1) provides that, upon an appeal to the Court of Appeals from an order of an intermediate appellate court affirming a judgment, sentence or order of a criminal court, this court may consider only questions of law (see, e.g., *People v Robinson*, 36 NY2d 224, 228).

The power to vacate judgment upon the ground of newly discovered evidence and grant a new trial rests within the discretion of the court (see, e.g., *People v Salemi*, 309 NY 208, 215; *People v Patrick*, 182 NY 131, 178; *People v Buchanan*, 145 NY 1, 30, app dsmd 158 US 31 [capital cases]). It has been repeatedly held that this type of discretion is unlimited in the lower courts and thus this court has no power in a noncapital case to review their exercise of discretion (see *People v Fein*, 18 NY2d 162, 169, app dsmd and cert den 385 US 649; *People v Mistretta*, 7 NY2d 843, 844; *People v Girardi*, 303 NY 887, 888; *People v Luciano*, 275 NY 547, 548; *People v Bonifacio*, 190 NY 150, 152; Cohen and Karger, Powers of the New York Court of Appeals, p 586 and n 13; p 723 and n 97; p 745 and n 40; see, also, Cardozo, *op. cit.*, at pp 49, 292; but see *People v Welcome*, 37 NY2d 811 [a brief memorandum decision apparently assuming reviewability because the court did not dismiss the appeal, but relying only upon a capital case, *People v Shilitano* [218 NY 161]).

Before completing discussion of the distinction between appealability and reviewability of issues in this court, reference should be made to *People v Slaughter* (37 NY2d 596), recently decided by this court. There, under CPL 330.30 rather than CPL 440.10, a motion was made before judgment for a new trial upon the ground of newly discovered evidence. Hence, its denial was appealable to the Court of Appeals even under the statutes and practice antedating the CPL, as discussed above. Without more the exercise of discretion in the *Slaughter* case would not have been reviewable in this court,

although the denial itself would be appealable. However, there was more. The allegedly newly discovered evidence related to possibly false testimony by police officers, a now classic ground for relief in *coram nobis* because of the "fraud on the court", even as the alleged suppression by the prosecutor of exculpatory evidence in this *Crimmins* case is both appealable and reviewable in this court, as discussed below. The court directly disposed of the issue therefore in the *Slaughter* case, citing notably to the treatise by Cohen and Karger (*supra*) at page 742, which refers to this court's very limited powers of review in noncapital criminal cases.

Moreover, even in a capital case, where its jurisdiction is not limited to issues of law, this court has been most reluctant to overturn the lower courts' exercise of discretion in denying a motion for a new trial upon the ground of newly discovered evidence (see, e.g., *People v Salemi*, 309 NY 208, 215, *supra*; *People v Patrick*, 182 NY 131, 178, *supra*; *People v Buchanan*, 145 NY 1, 30, app dsmd 158 US 31, *supra*).

Because this case has been so much litigated and because of the dissenter's plaint that justice has been denied, it is excusable, perhaps even necessary so that the specter of justice denied be laid to rest, to examine the question as if it were reviewable (cf. *People v Fein*, 18 NY2d 162, 169, *supra*). Nevertheless, the denial, without a hearing, of the motion to vacate judgment upon the ground of newly discovered evidence was proper.

Whether or not to hold a hearing on a motion to vacate judgment upon the ground of newly discovered evidence is discretionary with the court to which the motion is addressed (see, e.g., *People v Welcome*, 37 NY2d 811, *supra*; *People v Eng Hing*, 212 NY 373, 386; *People v Patrick*, 182 NY 131, 178, *supra*; *People v White*, 44 AD2d 749, 750; *People v Dinan*, 15 AD2d 786; *People v Maynard*, 80 Misc 2d 279, 283). As this court has made clear in capital cases where its power to review is not limited to the law, a hearing should be held to promote justice if the issues raised by the motion are sufficiently unusual and suggest searching investigation (*People v Shilitano*, 218 NY 161, 169, 170, *supra*; see *People v Arata*, 254 NY 565, 565-566; cf. *People v White*, 309 NY 636, 640-641; see, also, *People v Seidenshner*, 152 NYS 595). This standard is, of course, equally applicable to noncapital cases (see *People v Luciano*, 164 Misc 167, 171, affd 251 App Div 887, app dsmd 275 NY 547; *People v Gordon*, 142 Misc 25, 25-

26). To grant such a hearing where the court is able to reach its conclusion on the papers alone would serve no end of justice but would only protract futile litigation (see *People v Luciano*, 164 Misc, at p 171, *supra*).

Although defendant has limited her argument to whether she was entitled to a hearing on her motion, the dissent instead has addressed the merits of the denial of the motion. Indeed, the dissent offers no rationale for its unstated assumption that a hearing on the motion would somehow result in a decision more favorable to defendant from the hearing Judge. More likely is the People's characterization of what a hearing would accomplish: "Indeed, to have afforded appellant a hearing would merely have provided the prosecution with an opportunity to impeach [affiant's] credibility."

This is so because the affidavit is detailed and complete on its face. It obviously represents a determined effort by affiant, or whoever prepared his affidavit, to present all of the evidence he could possibly offer on defendant's behalf. Indeed, the affidavit goes beyond what affiant thought he had observed in the early morning of July 14; affiant gives his conclusion, based upon his later reading of a newspaper account of the killing, that the children he picked up were the Crimmins'. He offers an imaginative alternative hypothetical explanation, worthy of concoction by an A. Conan Doyle, consonant with affiant's sworn version of what he thought he saw and heard, of how the Crimmins children met their fate. Thus, a hearing on this motion would have been unnecessary and would have served only to postpone resolution of the controversy.³

However "understandable" affiant's reasons for the seven-year delay in disclosure may be regarded, the fact remains that affiant's recollection of the events of the early morning of July 14, 1965 must be recognized as inevitably influenced and inevitably colored by the passage of time and his acknowledged familiarity and undoubtedly obsessed concern with newspaper accounts of the case. Indeed, affiant admitted that his intriguing conclusion that the two children he picked up were the Crimmins' was the product of his independently-acquired newspaper "knowledge" of the case. Jurors and

3. Moreover, the motion was denied by the very trial court which, in the dissenter's words, must have been sensitive to the "pulsebeat of the courtroom." Indeed, it is for this reason that the motion to vacate judgment must be made to the court in which it was entered (see CPL 440.10, subd 1).

courts are confined, but also benefited, by a testimonial record developed in the adversarial process.

Moreover, even fully crediting affiant's sincerity, the denial, without a hearing, was proper because the court correctly assessed its probable impact upon the jury. Defendant has twice been convicted, after jury trials, of killing her daughter. As discussed above, her guilt was shown by overwhelming proof. There is no probability, as opposed to speculative possibility, that the jury would have returned a verdict more favorable to defendant had they had affiant's testimony. In saying even this, one must assume that affiant's testimony would be admissible, that is, that his belatedly disclosed, newspaper-stimulated description of the two children he "picked up" was sufficient to identify them as the Crimmins children, an uncertain assumption at best.

In sum, a hearing would only have delayed resolution of the motion supported by an affidavit complete on its face and, therefore, was not necessary. Moreover, there was no significant probability that the evidence in the affidavit if introduced at trial would have resulted in a verdict more favorable to defendant. Thus, the motion was properly denied without a hearing.

Defendant also moved to vacate judgment upon an additional ground, namely, that of asserted improper conduct by the prosecution in withholding from her information, provided by another deponent, allegedly helpful to her defense. This branch of her motion, brought under CPL 440.10 (subd 1, pars [f], [h]), is in the nature of an application for a writ of error *coram nobis* (see Denzer, Practice Commentary, McKinney's Cons Laws of NY, Book 11A, CPL 440.10, at p 183). The denial of this branch of her motion may, contrary to the rule which obtains with respect to newly discovered evidence, be reviewed by this court to determine whether there has been an abuse of discretion as a matter of law (see *Matter of Bojinoff v People*, 299 NY 145, 151, *supra*; Cohen and Karger, *op. cit.*, at p 745 and n 43). The distinction is based upon the character of the ancient remedy of the writ of error *coram nobis*, a remedy fashioned to inform the court of facts, such as, for example, fraud not reflected in the record, which as a matter of law would undermine the basis of its judgment (see, e.g., *People v Sullivan*, 3 NY2d 196, 198; see, generally, Cohen, Post-Conviction Relief in the New York Court of Appeals: New Wine in

Broken Bottles, 35 Brooklyn L Rev 1, 6). Even in *coram nobis* the findings of fact in the courts below are not reviewable in the Court of Appeals. The facts must be taken as found. The rules of law, however, as applied to the facts are, of course, reviewable in this court (see *People v White*, 309 NY 636, 641, *supra*). When the issue in the Court of Appeals is whether in *coram nobis* a hearing was properly denied, that determination may be reviewed only for an abuse of discretion as a matter of law (see *People v Richetti*, 302 NY 290, 294-295; accord, e.g., *People v Beasley*, 25 NY2d 483, 487; *People v Bagley*, 23 NY2d 814, 815; *People v Silverman*, 3 NY2d 200, 203; *People v Guariglia*, 303 NY 338, 342-343; cf. *People v Session*, 34 NY2d 254, 256). The bifurcating principle is that in *coram nobis* the judgment is attacked as infirm, while on motion to vacate judgment upon the ground of newly discovered evidence the validity of the judgment is not attacked, only the likelihood of a similar verdict being rendered if there were an enlargement of the evidence on the principle issue.

The affidavit of the other deponent was insufficient to ground an inference of improper suppression of evidence by the prosecution. Perhaps most important it does not contain relevant or competent evidence on the issue of guilt or innocence, but at best supplies clues arguably meriting investigation. The defendant has now had for some time opportunity, through unusually adept lawyers, to make such an investigation. There is still nothing beyond a remote speculative inference to offset what may be a strange coincidence involving two other little children, crediting the affidavit without qualification. The issue was not the truth and accuracy of the affidavit but whether one could say that there had been an improper suppression by the police rather than a reasonable exercise of judgment. This issue was determinable from the papers. There is no disagreement in the court concerning this branch of defendant's motion.

It is true that the road to justice in this 10-year-old case has been long. Much too long, indeed, on any view. Its length should not be further extended, however, by proffered "newly-discovered" evidence, baseless and weightless, nor should it be extended by erroneous, however dextrous, misapplication of this court's limited power to review and violation of time-tested and accepted grounds for ordering new trials in criminal actions. The road to justice, short or long, should be the road to justice, and not a primrose path.

Accordingly, the order of the Appellate Division should be affirmed.

COOKE, J. (concurring). I concur in the majority opinion affirming the Division's order, which affirmed an order of the Supreme Court, Queens County, denying defendant's motion to vacate a judgment of conviction and for a new trial upon the ground of newly discovered evidence. I do not retreat in any respect, except for the due regard which must be accorded a prevailing opinion, from the position taken and the dissent which I authored and in which I urged affirmance of an earlier order of the Appellate Division which reversed the judgment of conviction as to the manslaughter count, on the law, and granted a new trial on that count (see *People v Crimmins*, 36 NY2d 230, 243 *et seq.*). The issues on this appeal and that one are not the same. Here, even if it were reviewable, it cannot be said as a matter of law that the court, in denying the application to vacate the judgment based on newly discovered evidence, abused its discretion.

FUCHSBERG, J. (dissenting). The road to justice has been long in this 10-year-old case in which a mother was charged with the killing of her young son and daughter. Yet, I do not think we may say with any conclusiveness of law or fact that the end of that road was properly reached when, without even conducting a hearing, the trial court rejected defendant's motion for a new trial made on the basis of the affidavit of F. Sutherland Macklem, whose trustworthiness and whose averments have hitherto never been questioned. In the determination of that issue it should be irrelevant that she was twice found guilty by a jury. Her first conviction had to be reversed for jury misconduct; the second was flawed by now conceded trial error. The triumph of justice rests on its ability to overcome such impediments to a just decision.

Rather, as suggested by Justices RABIN and MARTUSCELLO at the Appellate Division (48 AD2d 663), the special circumstances here required that there be a plenary hearing as a precondition to the determination of whether the newly discovered evidence would have resulted in a verdict "more favorable to the defendant" (CPL 440.10, subd 1, par [g]). Accordingly, and for the further reasons which follow, I would modify the order and remand for a hearing.

The reversal of defendant's original conviction of man-

slaughter in the first degree for the death of her daughter, Alice Marie Crimmins, on the night of July 13, 1965 (33 AD2d 793), was affirmed by us unanimously in an opinion in which we said, with respect to the testimony of Sophie Earomirski concerning certain events which took place at 2 A.M. on July 14, 1965, that "the credibility of her testimony is essential to the prosecution's case." (26 NY2d 319, 324.) In contrast, the same opinion assesses the first trial testimony of Joseph Rorech, to whom defendant is unconvincingly alleged to have made an oral confession, as a witness who was "seriously challenged" and "subjected to searching cross-examination" (p 324).

Before retrial, the District Attorney secured a superseding indictment, which, in addition to the manslaughter accusation with respect to the death of her daughter, also charged the defendant with murder in the first degree of her son Edmund Crimmins, Jr. There followed the second conviction, but the Appellate Division reversed and dismissed the Edmund murder count and ordered a new trial on the Alice manslaughter count. (41 AD2d 933.) We affirmed the dismissal, thus terminating the Edmund charge, but, as to so much of the order as related to young Alice's death, the majority of our court voted to remand the case to the Appellate Division for determination of the facts. (36 NY2d 230.)

The Appellate Division had reversed the second verdict because the trial had been riddled with multiple errors, which it found had deprived the defendant of a fair trial. The majority of our court, though accepting the existence of these errors, denoted them as "harmless" by articulating and applying a rule on the basis of which it determined that "there is no significant probability in the light of the overwhelming proof that, had it not been for the errors which occurred, [the] jury would have acquitted the defendant" (36 NY2d, at p 243) and which it acknowledged was much less demanding than the Federal test under which it suffices that there be (p 241) "a reasonable possibility that the * * * [error] might have contributed to the conviction * * * (*Fahy v. Connecticut*, 375 U. S. 85, 86)."

It is noteworthy that none of the acknowledged errors involved the testimony of Sophie Earomirski. Instead, by emphasizing its "compelling" nature and that it was the only alleged "eyewitness testimony" (36 NY2d, at p 242), the court made her testimony an error-free cornerstone for its charac-

terization of the prosecution's case as "overwhelming". Indeed, the appraisal of the Earomirski testimony as pivotal was unanimous, for Judge COOKE in his dissent, in which I joined, accurately referred to her as a "major witness". (36 NY2d, at p 248.) The Appellate Division's subsequent affirmance on the same facts, since it followed on our constraining decision, of course adds little to our discussion.

Viewed in this frame of reference, the detailed Macklem affidavit clearly goes right to the heart of the case. Significantly, there was proof that the children, one of whose bodies was later found alongside a highway and the other in a vacant lot, shared a room, the door to which was kept locked, after they retired, by means of a hook and eye catch their father had installed to keep them from raiding the refrigerator. The window provided a possible means of street level exit from the room. Mr. Macklem, an electronics scientist whose reliability has gone unchallenged, tells us that *after* the time when Mrs. Earomirski's testimony at least tended to establish that the defendant was seen removing the dead body of the child Alice from her home, he picked up two hitchhiking children on a roadway in the vicinity of the Crimmins residence. He adds that their description tallied with that of the Crimmins children in, among other things, their ages, their self-identification as brother and sister, the fact that the boy was the "bigger" of the two and the fact that the girl was referred to by the boy by the similar-sound appellation "my sister" or "Missy", the latter being the one by which little Alice was in fact called. Mr. Macklem relates, normally enough it seems to me, that he made the association between these two children and the Crimmins children when he read newspaper reports of the case only a few days later.

When scientific rules of probability are applied to the many points of correspondence, including the coincidence of the hour, place, date, age, sex and number of children, the mathematical odds that result so overwhelmingly weigh against the possibility that these were not the Crimmins children that, if the affidavit is taken at face value, it is impermissible to say that such testimony might not have made the difference between a verdict of innocence and one of guilt. If Macklem's testimony stood up in accordance with his affidavit, it would knock out such a vital part of the underpinning for the denomination of the case presented against the defendant at her second trial as "overwhelming" so that, even allowing for

the newly enunciated harmless error doctrine, the so-called "harmless" errors almost automatically would have to be elevated to the status of reversible ones.

This is all the more so since I believe a painstaking analysis of the trial proof left plenty of room to question whether this was an appropriate case to apply the broadened definition of harmless error in the first place. Ready illustration is found in the three items of proof on which the majority here relies so heavily to paint a picture of overwhelming guilt, e.g. the so-called confession to Rorech, the testimony of dust given by Detective Piering and the medical examiner's testimony concerning what light the autopsy shed on the time of death. Each one but compounds the doubt.

The relationship between Rorech and the defendant appears to have been a most intimate one. But it comes through from the record with crystal clarity that neither the long-standing marital discord which separated her husband and herself or the interest she developed in other men detracted from her devotion as a mother to her two small children and her resolute determination that she continue to have custody of them. It is against that background that we must view Rorech's testimony that on one overwrought occasion the defendant uttered the words, "Joseph, forgive me, I killed her". That was the alleged confession. Though Rorech and the defendant were with each other constantly, almost unbelievably he maintained that she, neither on that occasion or any other, ever offered or was questioned by him as to any details. There was no explanation as to how the crime was perpetrated, no excuses or rationalizations for its commission, no justifications to mitigate moral guilt for such an horrendous and unnatural a double infanticide, no remorse, not even any troubled talk. Just the bold statement.

The words of this sparse confession must raise more psychological and factual questions than they answer. Is there anyone with some experience in life who has not witnessed the emotional and verbal self-flagellation of a parent who, no matter how blamelessly, has suffered the death of a child, whether through illness or violence or even suicide, expressed in almost identical language? Further, for about two years after the words were supposed to have been said, Rorech, though himself a suspect, neither in many meetings with the defendant's then counsel, to whom he had recommended her, nor on his two different Queens County Grand Jury appear-

ances, or in questioning by the Nassau County police, even once mentioned any such statement. It appeared on the horizon for whatever it was worth only 48 hours before the trial and after he had been supplanted in defendant's affections by one Anthony Grace and had worked out an immunity arrangement with the prosecution. The recognized need to bolster his testimony indeed appears to have led to one of the trial errors, an improper revelation to the jury of the administration of a sodium pentothal test to the witness, interestingly enough on an occasion before there was any recollection of a confession.

The proof about dust was at least equally vulnerable to attack. In order to controvert any argument that the children had exited through the window, the prosecuting attorney put on Detective Piering to testify that a chest below the window had an undisturbed film of dust, visible to him when a clean circle was formed upon his removal of a round lamp base. It turned out he could not have so visualized it because the lamp base had three separate, discrete legs. Having testified that it was only a "faint film" at the first trial two years after his observations, by the second one, when the issue had escalated in importance, he described the chest as "covered" with dust and stated that his recollection on this point was refreshed only two weeks earlier by a review of notes on this matter contained in police records. An examination of the police records and of Piering's own notes showed they contained no entry of dust whatsoever. Nor was there any such finding of dust in the special report of forensic experts from the police laboratory who promptly made a fine tooth comb examination of the children's bedroom. No wonder the prosecutor on summation found it necessary to explain, "Now, Piering, he's no genius. He's no Ellery Queen".

So far as the autopsy is concerned, it is claimed that the contents of the daughter's stomach proved she died sometime between 8:30 and 9:30 P.M., so that she could not have been alive at the time Mrs. Earomirski claims she saw the "bundle". That operates on the assumption the child's last meal was taken at about 7:30. The fact is the autopsy proves no such thing. Dr. Grimes, the medical examiner, who first examined the body the next afternoon, did not profess to know when the last meal was taken; he merely testified that from the undigested state of the food she died shortly after ingesting *a meal, whenever that was*. In fact, since the best, uncon-

tradicted and most disinterested testimony was that the child last ate at home at 7:30 P.M. and was last known to be alive at 9 P.M., the absence of any evidence of digestion was incompatible with the passage of the hour and a half, since the evidence proved that digestion begins at once and is a continual and progressive process. Furthermore, the contents of the meal she had at home, described to the police by the mother well before there was any autopsy report, varied considerably from the different foods found on the examination and, therefore, suggested that the child might have had another meal at some unknown time and unknown place considerably after the one taken at home. Thus, the autopsy proof, far from concluding the matter, left very much open the question of whether she was alive at the time covered by the Earomirski testimony and, incidentally, would have made the testimony of Mr. Macklem all the more vital.

All this is not to say that Alice Crimmins was not in fact guilty. She may very well have been. But it points up the essentially judgmental and factual nature of the preliminary determinations which have to be passed upon when we apply a broad harmless error rule. And, in accordance with the analogy which the majority, correctly I believe, draws between that rule and the standard for determining when a motion to vacate a judgment upon the ground of newly discovered evidence should be granted, the latter calls for a similarly permissible exercise by us of power to determine whether in a particular judgmental and factual setting there has been an abuse of discretion as a matter of law. In either case that does not mean we are passing on facts as such, but rather considering them to the extent that they are a foundation for the application of law.

I dissented from the "harmless error" decision because, once meaningful error is established, I do not believe that, from the remote fastness of an appellate court, the pulsebeat of the courtroom can be perceived with sufficient reliability to predict whether, when there has been such error, the result would have been affected. Put another way, an appellate court is too different from a lay jury to permit one to substitute for the other. However, accepting that decision as a *fait accompli* and now acting on constraint of it, I respectfully suggest that, in light of the Macklem affidavit, any argument about harmless error begs the question.

This is not an instance of a quest for a new trial on

evidence that was or, by the exercise of due diligence, could have been available to the defendant at an earlier time. Concededly, immediately upon its discovery, defendant moved with great expedition. Nor is this a situation where an investigation by the District Attorney has resulted in the disclosure of even a single collateral fact making the affiant's assertions suspect. In fact, there is not the slightest suggestion that Mr. Macklem was unwilling to expose his story to interrogation by the People, in either a formal or an informal setting, whether at the initiative of the People or of the defendant. Defendant's counsel did volunteer to produce him. And the substance of the affidavit, obviously, is not merely cumulative or impeaching in nature.

The fact that Mr. Macklem did not come forward until nearly seven years after the event is not to be blithely ignored. But, besides being a circumstance beyond the control of the defendant, standing alone, especially in a case of the seriousness and complicated litigation history of the one before us, that fact was not enough to allow for the trial court's rejection of the motion out of hand. The delay merely emphasized the urgent need for the kind of scrutiny afforded only by an adversary hearing, with its opportunity for direct personal confrontation. This is all the more so here since, curiously, Mrs. Earomirski, as to whom both trial records reveal evidence of instability, had herself not come forward as a witness until about two years after the crime. For that matter, as already indicated, that was true of Rorech as well.

Mr. Macklem himself does not leave his delay unexplained. His affidavit tells us the following:

"The first time I realized that these two children were the Crimmins children was when I saw the report in the Thursday edition of the New York Times.

"Because there was no mention in the press of a possible suspect, I refrained from coming forward, because I was terrified that I might be wrongly accused of a crime.

"I was certain that the children were the Crimmins' children because I left them at 162nd Street; because their ages seemed to coincide with the ages reported in the press, because the children were brother and sister and the brother was bigger.

"I followed the first trial in the newspapers and when I read what was alleged to have happened I then knew that it was

impossible. The little girl could not have been killed two to four hours after a 7:30 or 8:00 o'clock meal.

"The girl and boy were very much alive when I left them and Mrs. Earomirski could not have seen what she claimed to have seen at 2:00 A.M. July 14.

"When Mrs. Crimmins was convicted the first time, I talked to my lawyer about the case, pretending that I was discussing it purely as a matter in the news. He said that the conviction would not stand and that she would surely be released on bail shortly.

"The more I thought of the case, the more I convinced myself that she had to be acquitted during the second trial.

"Having kept silent that long, I allowed myself to maintain my silence, particularly because this was not an ordinary public trial, but a brutally publicized trial, and I feared the publicity that would result from any revealed connection with the case.

"When the second trial resulted in a conviction for murder, I could not longer remain silent, but confided in my attorney, and asked him to contact the attorneys for Mrs. Crimmins."

Though his conduct hardly comports with the civic ideal, an elementary knowledge of human nature makes Mr. Macklem's actions quite understandable. Hesitation about becoming "involved" often breeds delay, which in turn leads to embarrassment at having already delayed so long.

In these circumstances, it appears to me that it was an abuse of discretion as a matter of law not to grant a hearing on the basis of Mr. Macklem's affidavit. The difference between a determination on papers and one that permits confrontation with a human being is not a slender one and is not to be discounted casually. The appraisal of Mr. Macklem's affidavit involved an evaluation of his powers of observation, recollection, motivation, intelligence and veracity. Were they all to be assumed the motion should have been granted. If they were not, since no basis for impeachment of any of these subjective qualities was offered by the prosecution, a determination should only have been made after testing the affiant with the aid of tried tools such as cross-examination.

Until today, I thought that we had a reservoir of power to review an abuse of discretion in a criminal case, even though we have exercised it sparingly (*People v Slaughter*, 37 NY2d 596; *People v Welcome*, 37 NY2d 811; *People v Englese*, 7

NY2d 83; *Matter of Bojinoff v People*, 299 NY 145, 151; *People v La Brake*, 28 NY2d 625, revg on dissent with additional comments 35 AD2d 631; Cohen and Karger, Powers of the New York Court of Appeals, § 198, p 745 [1952 rev ed]. I agree with the majority that questions of fact may not be reviewed, but whether there has been an abuse of discretion is a question of law, not of fact. It matters not that the discretion which we review necessarily was exercised in a factual setting. And that is so even though we must look at the facts in order to determine whether the discretion was indeed abused. As has been recently said in a somewhat similiar context, "more than a merely mechanical categorization between law and fact is merited if this Court is to perform its great function to review." (*People v Santos*, 38 NY2d 173, 176.)

Since, in the absence of any enabling statute, the right of appeal to us from a postjudgment application for a new trial based upon freshly discovered evidence did not exist prior to the enactment of the CPL in 1971, with the fullest respect to my colleagues, the prior history which the majority opinion relates is, therefore, hardly relevant. Because there was no right of appeal there was then, a fortiori, also no right of review. Given this fact, a close reading of the cases decided during that period indicates that, when they speak in terms of reviewability, they must be interpreted either as engaging in dicta or as loosely referring to nonreviewability when nonappealability was intended. Indeed, one suspects that such verbal usage had its genesis in the fact that, at that time, postjudgment orders relating to motions on newly discovered evidence were not part of the judgment roll and, accordingly, were not even physically available for "review" (see *People v Priori*, 163 NY 99, 107-108).

In any event, none of the cases suggest any constitutional limitations on the right of review. And now that the Legislature has granted a right of appeal, the concomitant right to review on such appeal should follow. It hardly seems likely that those who gave birth to the statute intended it to be stillborn. For a statute usually has some purpose or object to accomplish and we are required to so assume (*Montgomery v Daniels*, 38 NY2d 41).

Significantly, not a single case in our court since the CPL came into effect in 1971 has found an order denying such a motion for new trial nonreviewable here. Indeed, at about the

very time the present case was argued, we decided *People v Welcome* (37 NY2d 811, 812-813, *supra*), where in reviewing an identical order denying a new trial based upon freshly discovered evidence, we specifically ruled on whether "the Trial Judge abused his discretion in denying the motion without a hearing". Similarly, in *People v Slaughter* (37 NY2d 596, *supra*), as a fair reading of its opinion makes clear, we again exercised the power to review. The importation *pro hac vice* of a possible rationale not there expressed does not detract from our point.

Furthermore, CPL 440.10 makes no distinction between posttrial, postjudgment motions, irrespective of whether they are based on newly discovered evidence or not. It also makes no special distinction for cases that, before 1971, fell within the traditional scope of the common-law writ of *coram nobis*, which is now embraced within the same statutory scheme that applies to all discretionary postjudgment motions. There is no reason now, on the basis of a history whose premise is gone, to carve out an exception for motions on the basis of newly discovered evidence.

In reviewing whether discretion has here been abused it is well also to consider that legislative changes have relaxed the statutory standard for a hearing. So the new evidence must now be only "of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant." (CPL 440.10, subd 1, par [g]; *People v Maynard*, 80 Misc 2d 279, 283-284; see, also, 6 Zett, New York Criminal Practice, par 50.3, subd [1], par [g]; cf. ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Post Conviction Remedies, § 2.1, subd [a], par [v]; Uniform Post Conviction Procedure Act, § 1, subd a, par [4]; *Kyle v United States*, 297 F2d 507, 514.) The support for the motion here met all the cited standards.

In *People v Rensing* (14 NY2d 210, 214), after sentencing it was disclosed that Rensing's codefendant, who gave damaging testimony against him at trial, was insane at the time and had a long history of mental illness. Despite overwhelming evidence of guilt, including a confession, our court reversed Rensing's conviction and ordered a new trial without a hearing. Judge (later Chief Judge) FULD went on to distinguish *People v Salemi* (309 NY 208), on which the majority here relies, noting "that the matter relied upon by *Salemi* for a new trial 'was not new matter at all, but had been before the

court and jury on the main trial' (309 N.Y., at p. 212)." (14 NY2d, p 214.) True, the reversal in that case took place in a capital case, where we have the power to review the facts as such, but it appears to me that this should have no bearing on the threshold question, raised by a motion for a new trial based on newly-discovered evidence, as to whether a hearing to develop facts should be held in the first place. (Cf. *People v Ledwon*, 153 NY 10; *People v Silver*, 33 NY2d 475.)

Therefore, while I am in accord with the majority on the separate matter raised by the Feldman affidavits, I conclude that the failure to order at least a hearing on the Macklem affidavit, which stands uncontradicted and unimpeached, was an abuse of discretion as a matter of law and, accordingly, I would so modify the order of the Appellate Division.

Judges JASEN, GABRIELLI, JONES and WACHTLER concur with Chief Judge BREITEL; Judge COOKE concurs in a separate opinion; Judge FUCHSBERG dissents and votes to modify in another separate opinion.

Order affirmed.

Motion for a New Trial -- Appellate Division

People v. Crimmins, 48 App. Div. 2d 663

(2d Dept. 1975)

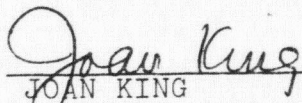
21 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v ALICE CRIMMINS, Appellant.—This case has been remitted to us by the Court of Appeals. Defendant had appealed to us from (1) a judgment of the Supreme Court, Queens County, rendered May 13, 1971, convicting her of murder in the first degree and manslaughter in the first degree, upon a jury verdict, and sentencing her to life imprisonment for murder and to a prison term of 5 to 20 years for manslaughter, the sentences to run concurrently; and (2) an order of the same court, dated July 28, 1972, which denied her motion for a new trial on the grounds of newly discovered evidence and improper conduct by the prosecutor in withholding from her information potentially helpful to her defense. We reversed the judgment as to the murder count,

on the law and the facts, and dismissed that count, on the law; reversed the judgment as to the manslaughter count and granted a new trial as to that count, on the law; and dismissed, as moot, the appeal from the order denying a new trial; the Court of Appeals affirmed our determination with respect to the murder conviction; reversed it with respect to the manslaughter conviction and remitted the case to us for determination of the facts as to that conviction in conformity with CPL 470.40 (subd. 2, par. [b]); and pointed out that with such remission defendant becomes entitled to consideration and disposition of her appeal from the order denying her motion for a new trial (*People v Crimmins*, 41 AD2d 933, affd in part and revd in part 36 NY2d 230). We now affirm the conviction of manslaughter in the first degree and the order denying the motion for a new trial. No opinion. Hopkins, Munder and Christ, JJ., concur; Rabin, Acting P. J., and Martuscello, J., dissent and vote to remand the case to the trial court for a plenary hearing on the motion for a new trial, with the following memorandum: The motion was denied summarily without a hearing. The trial court held as to the first ground urged that the affidavits relied on did not create a probability of a verdict more favorable to defendant. As to the second ground the trial court held that there was no showing that the convictions had been obtained by fraud or misrepresentation and that the prosecutor's conduct, even if improper, would not require a reversal, because the testimony offered was speculative, immaterial to the issue of defendant's guilt and inadmissible at trial, and that the prosecutor's failure to disclose the information did not violate defendant's constitutional rights. In our opinion the motion should not have been denied, without a hearing, on either of the two grounds urged. In light of the significance of the issues involved, the question whether the statements and the affidavits were truthful should have been determined at a hearing, where credibility could have been assessed on a more substantial basis than written statements and where a more complete record, with testimony, would allow both trial and appellate courts to more effectively weigh the impact such testimony might have had on the verdict. Only then could it be determined whether the evidence "is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant" (CPL 440.10, subd 1, par [g]). If we were not voting to remand the case for a plenary hearing on the motion for a new trial, we would affirm the judgment with respect to the conviction of manslaughter in the first degree.

AFFIDAVIT OF SERVICE BY MAIL

I, JOAN KING, being duly sworn, deposes and says that,

I deposited on August 22, 1977, two copies of the attached appendix in an authorized depository for mail, duly stamped and addressed to the Attorney for Respondents-Appellees, Louis J. Lefkowitz, attention of David Birch, Two World Trade Center, New York, New York 10047.


JOAN KING

Sworn to before me this

22nd day of August, 1977.



JAMES ONNEMBO
Notary Public, State of New York
No. 52-4500437
Qualified in Suffolk County
Commission Expires March 30, 1979